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CASES DETERMINED
BY THE
ST. LOUIS, KANSAS CITY AND SPRINGFIELD
COURTS OF APPEALS
OF THE
STATE OF MISSOURI,

REPORTED FOR THE
ST LOUIS COURT OF APPEALS
February 1, 1910, to April 5, 1910,
By Thomas E. Francis of the St. Louis Bar,

FOR THE
KANSAS CITY COURT OF APPEALS
By John M. Cleary of the Kansas City Bar,

AND FOR THE
SPRINGFIELD COURT OF APPEALS
By Lewis Luster of the Springfield Bar,

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JUDGES OF THE
ST. LOUIS COURT OF APPEALS.

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HON. RICHARD L. GOODE,
HON. ALBERT D. NORTON, } *Judges.*

JOSEPH FLORY, *Clerk.*

THOMAS E. FRANCIS, *Reporter.*

JUDGES OF THE
KANSAS CITY COURT OF APPEALS.

HON. ELBRIDGE J. BROADDUS, *Presiding Judge.*

HON. JAMES ELLISON,
HON. JAMES M. JOHNSON, } *Judges.*

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JUDGES OF THE
SPRINGFIELD COURT OF APPEALS.

HON. J. P. NIXON, *Presiding Judge.*

HON. ARGUS COX,
HON. HOWARD GRAY, } *Judges.*

H. H. MITCHELL, *Clerk.*

LEWIS LUSTER, *Reporter.*

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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1909.

(Continued from Volume 146)

R. W. PORTER, Respondent, v. ILLINOIS SOUTHERN RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, February 21, 1910.

RAILROADS: Negligence: Killing Stock: Evidence Held Sufficient.

In an action for double damages for the killing of a mare by one of defendant's locomotives at a point where the right of way was unfenced, it is *held* there was evidence to weigh on the question whether the animal was killed by a collision with a train.

Appeal from St. Francois Circuit Court.—*Hon. Chas. A. Killian*, Judge.

AFFIRMED.

W. T. Abbott and *C. J. Stanton* for appellant.

D. L. Rivers for respondent.

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GOODE, J.—The only point against the judgment in this case, which is an action for double damages for the killing of a mare by one of defendant's locomotives at a point where the right of way was unfenced, is that the evidence did not show the animal was killed by a collision with a train. There was evidence for the court to weigh on this point, the case having been tried without a jury. Plaintiff testified the animal was killed by an engine, though he said he did not see the collision. He was not cross-examined as to the reason why he so testified when he was not an eye witness. But another witness said she was killed about two hundred feet from the crossing of the railroad and a highway, and when he saw her was pretty badly cut up and bruised; further, there were signs on the track she had been struck by a railroad engine and carried thirty feet along the track before being thrown off to one side. This witness said he noticed "hair and stuff on the side of the track, and hide."

The judgment is affirmed. All concur.

WILLIAM PRUITT, Respondent, v. ILLINOIS
SOUTHERN RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, February 21, 1910.

1. **RAILROADS: Killing Animals: Sufficiency of Evidence: Facts Stated.** In an action against a railroad company to recover damages for the death of a mule, evidence that the mule was found lying on the track, with its side torn open and its entrails protruding, that there were indications on the track it had been struck by an engine, and evidence by a conductor of one of defendant's trains that his train struck it the night before it was found, was sufficient to prove it was struck and killed by one of defendant's locomotives.
2. ———: ———: **Fences: Double-Damage Statute.** The double-damage statute not only requires railroad companies to maintain good gates and fences, but to use diligence to keep the

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gates closed; and a railroad company would be liable on the statute if an animal got upon the track in consequence of careless omission of its employees to keep a gate closed.

3. ———: ———: ———: ———: Variance Between Pleading and Proof: Case for Jury. In an action against a railroad company to recover double damages for the death of a mule, where the petition alleged the mule went upon the track in consequence of defendant's failure to maintain fences and gates in good condition, and the evidence did not conclusively show the mule went on the right of way through an open gate, instead of a broken place in the fence, defendant was not entitled to a directed verdict on the ground no inference could be drawn from the evidence of an omission of duty on its part.
4. APPELLATE PRACTICE: Instructions: Invited Error. Defendant cannot, on appeal, properly assign error on the ground the court submitted an issue outside the scope of the pleadings, where the theory of liability thus submitted was submitted at the request of defendant.

Appeal from St. Francois Circuit Court.—*Hon. Chas. A. Killian*, Judge.

AFFIRMED.

W. T. Abbott and *C. J. Stanton* for appellant.

(1) The demurrer offered by appellant at the close of respondent's case should have been sustained. Respondent offered no proof to show a collision with appellant's train or that any train was ever run over the road near where the mule was found. *Gilbert v. Railroad*, 29 Mo. App. 65; *Lindsay v. Railroad*, 36 Mo. App. 53; *Logan v. Railroad*, 111 Mo. App. 674; *Perkins v. Railroad*, 103 Mo. 52; *Shaw v. Railroad*, 110 Mo. App. 561. (2) All the evidence in this case went to show that the mule got on the track through the open gates, and that the open gates was the proximate cause of the accident. A complaint for not fencing, or for having a defective fence states no cause of action for leaving a gate open. Defendant's demurrer offered at close of the entire case should have been sustained. *Stonebraker v. Railroad*, 110 Mo. App. 497; *Litton v. Railroad*, 111

Mo. App. 144; *Kavanaugh v. Railroad*, 163 Mo. 54. (3) If an animal goes upon a railroad track in consequence of gate being left open, the construction of the gate, whether good or bad, is not the proximate cause of the accident; but the proximate cause is leaving the gate open, and plaintiff cannot be allowed to conjecture that if the gate had been closed the mule would still have entered upon the track. *Dickinson v. Railroad*, 103 Mo. App. 336; *Kavanaugh v. Railroad*, 163 Mo. 58. (4) As the evidence shows conclusively that the gates were shut at 2:45 o'clock in the afternoon of the day the mule was struck and only a few hours preceding the accident, and that the mule came upon the right of way some time during the succeeding night, by reason of the gates being left open by some third person, there is no liability on the part of the defendant. *Ridenor v. Railroad*, 81 Mo. 227; *Binnicker v. Railroad*, 83 Mo. 660; *Harrington v. Railroad*, 71 Mo. 384; *Box v. Railroad*, 58 Mo. App. 359; *Stephens v. Railroad*, 34 Mich. 323; *Railroad v. Swearingen*, 47 Ill. 206; *Railroad v. Dickerson*, 27 Ill. 55; *Vineyard v. Railroad*, 80 Mo. 92; *Railroad v. Kavanaugh*, 163 Mo. 54. (5) There was no evidence to indicate on the part of defendant either actual notice of the gates being open, or of sufficient time elapsing after the gates were left open, to impute notice to defendant of that fact, therefore no liability accrued to defendant on that score. *Fitterling v. Railroad*, 79 Mo. 504; *Clardy v. Railroad*, 73 Mo. 576; *Case v. Railroad*, 75 Mo. 668; *Binnicker v. Railroad*, 83 Mo. 660; *Ridenor v. Railroad*, 81 Mo. 227; *Laney v. Railroad*, 83 Mo. 466; *Railroad v. Kavanaugh*, 163 Mo. 58. (6) There is no substantial evidence to support the verdict in this case, and therefore the judgment should be reversed. No verdict will be permitted to stand unless it be supported by substantial evidence. *Blumenthal v. Torino*, 40 Mo. 159; *Rea v. Furgeson*, 72 Mo. 225; *Crane v. Timberlake*, 81 Mo. 481; *Avery v. Fitzgerald*, 94 Mo. 207; *Long v. Moon*, 107 Mo. 334; *McFarland v. Accident*

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Assn., 124 Mo. 204; State v. Bryant, 134 Mo. 246; Hewitt v. Steele, 136 Mo. 327; Cole v. Armour, 154 Mo. 333; Ashley v. Green, 38 Mo. App. 288; Kehoe v. Phillipi, 42 Mo. App. 292; Hientz v. Mertz, 58 Mo. App. 405; Gage v. Trawick, 94 Mo. App. 307; Cook v. Railroad, 94 Mo. App. 417; Baker v. Stonebraker, 36 Mo. 345; Price v. Evans, 49 Mo. 396; Beautrain v. Railroad, 78 Mo. 44; Rosecrans v. Railroad, 83 Mo. 678; Spohn v. Railway, 87 Mo. 74; Cannon v. Moore, 17 Mo. App. 92. (7) A verdict which must have necessarily been the result of a mere guess or conjecture on the part of the jury, ought not to be permitted to stand. Moore v. Railroad, 28 Mo. App. 622; Peck v. Railroad, 31 Mo. App. 123; Pfeffer v. Railroad, 98 Mo. App. 291; Shertle v. Railroad, 97 Penn St. 450.

GOODE, J.—Action to recover double damages for the killing of a mule by one of defendant's trains at an unfenced point on the railway where there should have been good fences and gates. The evidence for plaintiff went to prove the fences on either side of the right of way in the vicinity of where the animal was killed were down in many places and would not turn stock. A private road crossing was nearby which communicated with the country on either side of the right of way through gates, and the evidence shows good gates, with latches and hooks, and a high swing so they could be easily opened and closed, were hung at this crossing. The testimony for plaintiff goes to prove these gates had stood open almost constantly for three or four years and in fact several witnesses who passed the spot frequently, testified they never had seen them closed. On the other hand, the evidence for the company is the gates were kept closed as much as possible by the section gang, but travelers would leave them open. The section foreman testified he closed the gates at two-forty-five p. m. on July 7, 1907, the day the mule was killed. Some of the evidence for defendant

went to prove the fence on either side of the right of way was maintained in good condition, and as to these matters there was a conflict. The mule was found lying on the track about six or seven o'clock on the morning of July 8th, with its side torn open and its entrails protruding. There were indications on the track it had been struck by an engine, and the conductor of one of defendant's trains testified his train struck it at nine o'clock on the night of July 7th. Notwithstanding this evidence we are asked to hold there was no proof one of defendant's trains collided with and killed the animal, which, of course, we decline to do.

It is contended all the evidence regarding where the mule got on the track, tended to prove it got on through an open gate, and as plaintiff had declared against defendant for not maintaining the gates and fences in good condition, instead of negligently leaving the gate open, there was no evidence to support the verdict on the ground stated in the petition. The construction put on the double-damage statute is that it not only requires a railroad company to maintain good gates and fences, but to use diligence to keep the gates closed. [West v. Railroad, 26 Mo. App. 344; Morrison v. Railroad, 27 Mo. App. 418; Woods v. Railroad, 51 Mo. App. 500.] It follows defendant would be liable on the statute if plaintiff's mule got on the track in consequence of careless omission of the company's employees to keep the gates closed. In Atchison, etc., Railroad v. Kavanaugh, 163 Mo. 54, 63 S. W. 374, the Supreme Court held that if the animal killed was shown to have gone on the track through an open gate, it was immaterial whether the gate was constructed properly or not, as the fault of construction would not be the proximate cause of the death, but carelessly leaving the gate open. Following the principle of that decision, this court held in Stonebraker v. Railroad, 110 Mo. App. 497, 85 S. W. 531, and Litton v. Railroad, 111 Mo. App. 140, 85 S. W. 978, that if a party sought to recover damages for the

loss of an animal because of a gate on a railway right of way having been carelessly left open, this fact ought to be averred, and it was not sufficient to aver failure to erect and maintain good fences and gates, for the reason that in an action of tort, it is incumbent on the plaintiff to charge the defendant with the specific omission of duty for which a verdict is expected. In the Litton case we held, too, that if the statement alleged failure to erect and maintain statutory fences and gates, then proving the animal in controversy got on the track through an open gate instead of through a defective fence or gate, did not constitute total failure of proof, but a variance, and unless the company sought to keep out the testimony by timely objection or to take advantage of the variance in the mode prescribed by statute, the judgment would not be reversed. In the case at bar no objection was made to the reception of testimony about the gate standing open, but instead defendant's counsel sought to prove the mule went on the track through an open gate, that the gate had been closed by the section foreman on the afternoon of the day of the accident, and hence defendant had performed its full duty in the matter, as the gate had been opened by some one else after it was closed by the section foreman and he had had no opportunity to discover it was open before the mule was killed. As the evidence did not conclusively show the mule went on the right of way through an open gate instead of a broken place in the fence, defendant was not entitled to an order for a verdict in its favor on the ground that no inference could be drawn from the evidence of an omission of duty on its part.

In submitting the case to the jury the instructions granted at the request of plaintiff allowed a verdict for him only in the event the jury found the mule went on the track in consequence of the failure of defendant to erect and maintain fences, cattle-guards and gates of the statutory description, therein following the aver-

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ments of the petition. Nothing was said in those instructions about defendant being liable if it was found the mule got on the track through an open gate. This matter was brought before the jury by the instructions granted at defendant's request, wherein the jury were told, in substance, if the mule went on the track through an open gate, and the gate was left open by some unknown person on July 7th, the verdict should be for defendant, unless the jury found sufficient time had elapsed from the opening of the gate by such person, to the time of the accident, for defendant's employees to have discovered it was open by the exercise of ordinary diligence. This theory of liability having thus been suggested to the jury at the request of defendant, no error can properly be assigned because of the ruling.

The judgment is affirmed. All concur.

D. C. SHOPTAUGH, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, February 21, 1910.

1. **COMMON CARRIERS: Failure to Furnish Cars: Pleading: Sufficiency of Petition.** A petition which alleges that during the four months from July to October, inclusive, plaintiff offered for shipment 120,000 feet of oak logs of the value of \$1920 and 60,000 feet of cypress logs of the value of \$840 from a certain station, and asked for cars, but that defendant railroad company failed to furnish them, and that in consequence the logs became damaged contains "a plain and concise statement of the facts constituting the cause of action," and states a case for not furnishing cars to haul any of the logs during the months named.
2. ———: ———: ———: ———: **Motion to Make Definite and Certain Properly Denied.** The natural meaning of the averment in said petition that plaintiff "frequently and on numerous occasions made demands of defendant for cars on which to load

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and ship said logs and defendant promised to furnish them, but did not do so," is that demands were preferred frequently for cars to haul all the timber previously alleged to have been "placed for shipment over defendant's railroad," and not for cars for separate shipments, so that a motion to require the petition to be made definite and certain by stating the quantity of lumber on hand "for each particular shipment and the dates thereof," was properly overruled.

3. ———: ———: ———: ———: ———. Allegations in said petition of the value of the two species of logs when ready to ship and the depreciation in value during the period they lay at the shipping point for lack of cars were sufficient to enable defendant to prepare its defense, so far as the measure of damages was involved, and it had no right to call on plaintiff to allege the market prices either at such point or at the intended destination.
4. ———: ———: ———: ———: ———. In an action against a railroad for failure to furnish cars to transport plaintiff's logs, plaintiff need not designate in his petition the character of cars required; defendant being presumed to know what kind were needed.
5. ———: ———: ———: ———: Method of Raising: Trial Practice. In such a case, the proper method of raising the objection that defendant was entitled to have information as to the dates on which plaintiff made application for the cars was by objecting to evidence on the ground several causes of action were united in the petition but not separately stated so as to be distinguished.
6. **PLEADING: Motion to Make Definite and Certain: Pleading Over: Waiver.** It is likely a motion to require the petition to be made definite and certain is waived by answering and going to trial.
7. **COMMON CARRIERS: Failure to Furnish Cars: Duty to Provide Necessary Equipment: Extraordinary Traffic.** An extraordinary increase of business, which could not have been anticipated and provided for by using judgment and diligence and which prevents a railroad from furnishing cars, is a good defense to an action for its failure to furnish cars.
8. ———: ———: **Witness: Competency.** In an action against a railroad for failure to furnish cars to transport plaintiff's logs, witnesses, who, though not railroad experts, were timber shippers, were competent to testify to a car shortage and as to whether the deficiency in number of cars was any greater than in preceding years.

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9. ———: ———: Evidence: Shortage in Previous Years. In an action against a railroad company for failure to furnish cars to transport plaintiff's logs, evidence that for several years prior to the year in question there had been a shortage in timber cars equal to the deficiency that year inclined to overcome a defense of an unusual volume of traffic which could not have been foreseen, and to prove a scarcity of cars had existed so long defendant could and should have corrected it.
10. ———: ———: Shipper Continuing to Haul Logs After Knowledge of Car Shortage. In an action against a railroad for failure to furnish cars to transport plaintiff's logs, where plaintiff did not know from the first that he could not ship, it was not a defense that, after discovering such fact, he continued to haul logs to the station, but cause only for denying redress to the extent he increased his damage by accumulating logs after he knew that cars would not be available.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

AFFIRMED.

W. F. Evans and *Moses Whybark* for appellant.

(1) The court erred in overruling the motion filed by defendant to require the plaintiff to make his petition more definite and certain. The general charge of failure to furnish cars was insufficient to advise the defendant of the condition of its transportation facilities with reference to the needs of plaintiff at the time plaintiff desired to make shipments, and time was therefore an essential ingredient in the defense, and whenever such is the case it must appear with certainty in the petition. 6 Am. and Eng. Ency. Pl. and Pr., pp. 255, 256. And the motion in this case was proper and it was timely filed. *Ruebsam v. Transit Co.*, 108 Mo. App. 437; *Wilbur v. Railroad*, 125 Mo. App. 689; *Linnville v. Green*, 125 Mo. App. 289. (2) Under the testimony in this case the defendant was not liable to plaintiff for failing to furnish cars to make his shipments, and the court should have found for the defendant, and

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erred in overruling the defendant's demurrer to the evidence. The evidence showed a case where the defendant was called upon to provide unusual facilities, not anticipated and not possible for it to prepare for. *Heading & Stave Co. v. Railroad*, 119 Mo. App. 495; *Ballentine v. Railroad*, 40 Mo. 491; *Dawson v. Railroad*, 79 Mo. 296; *Faulkner v. Railroad*, 51 Mo. 311; *State ex rel. v. Railroad*, 99 N. W. 309; *State ex rel. v. Railroad*, 101 N. W. 23; *Strought v. Railroad*, 87 N. Y. Supp. 30; 4 *Elliott on Railroads*, (1 Ed.), sec. 1470, p. 2287; *Moore on Carriers*, p. 105; *Pruitt v. Railroad*, 62 Mo. 527. (3) The testimony conclusively showed that defendant had sufficient equipment to transact the business ordinarily done on its road, and had fully performed its obligations as a common carrier in that respect; the testimony further conclusively showed that there was an unusual pressure of business in the year 1907 and up to about November 15th, which it was unable to meet and could not possibly provide the facilities for transportation in time to meet this emergency, and that it distributed the cars it controlled to the various stations so as to accommodate shipping as well as it could to perform its duty, and further that there was a car famine all over the United States caused by unusual pressure of shipping. The defendant is not liable to plaintiff under the facts in this case. *Ballentine v. Railroad*, 40 Mo. 491; *Dawson v. Railroad*, 79 Mo. 296; *Faulkner v. Railroad*, 51 Mo. 311; *Heading & Stave Co. v. Railroad*, 119 Mo. App. 495; 5 *Am. and Eng. Ency. of Law* (2 Ed.), pp. 167, 168; *Railroad v. Wolcott*, 141 Ind. 267; *Ayres v. Railroad*, 71 Wis. 372; *Railroad v. Racer*, 10 Ind. App. 503; *Importing & Steamship Co. v. Railroad*, 104 Md. 693; *Maulden v. Railroad*, 73 S. C. 9; 6 *Cyc. of Law and Pro.*, pp. 445-6 (par. 6). (4) The plaintiff testified that he requested the agent at Hayti to furnish him cars, and he was advised by the agent that he was unable to furnish

him cars to make his entire shipments, but would do the best he could, yet he continued to haul logs to Terry, knowing the car situation. There never was an agreement on the part of the defendant to furnish him all the cars he required, but he was fully advised that the defendant was unable to do so. He was not entitled to judgment for that reason, considering all the facts in the case as to the car situation; besides the defendant had never accepted the logs for shipment. Hauling the logs to the switch was not an acceptance by the defendant for shipment. 6 Cyc. of Law and Pro., pp. 444-6; *Importing & Steamship Co. v. Railroad*, 104 Md. 693; *Ayres v. Railroad*, 71 Wis. 372.

Shepard & Shepard for respondent.

GOODE, J.—Action for damages for defendant company's failure to furnish plaintiff sufficient cars to ship 120,000 feet of oak logs of the value of \$1920, and 60,000 feet of cypress logs of the value of \$840, from the station of Terry to Chaffee, Missouri, during the months of July, August, September and October, 1907. Plaintiff averred he frequently demanded of defendant's agent at Hayti, a station three miles from Terry, and the right place to apply, cars in which to ship the said logs, the agent promised to furnish them, but did not; by reason of this omission of duty the logs became damaged and depreciated in value and caused plaintiff a loss of \$920, for which he prayed judgment. Besides a general denial, the answer said defendant furnished plaintiff all the cars at the station of Terry needed to transact the average business done with him there and consistent with defendant's duty to its other patrons at said station and elsewhere along its line; that if plaintiff was prevented from making timely shipments of his logs by lack of cars during the interval mentioned, it was on account of the unusual pressure of business at the station, together with the unusual pres-

sure of business on defendant's railroad at other places, which prevented defendant from supplying cars at different stations necessary to meet the emergency—an emergency which could not be foreseen in time to prepare for it; that defendant made a just distribution of cars at Terry with reference to its duty as a common carrier to all its patrons. It is also averred an extraordinary freshet rendered it impossible for a considerable period to supply cars at Terry or elsewhere on the line of defendant's railway or to haul shipments for plaintiff. The new matter in the answer was put in issue by a reply denying the averments.

It is enough to say of the testimony in this case that it proved plaintiff needed four cars a day, which were not furnished as demanded during the period mentioned, and he suffered loss in consequence; further, that he demanded cars frequently and the agent sometimes promised to furnish them but did not, and at other times said they could not be obtained. For defendant the evidence tended to prove there was a great and unexpected increase of transportation business over the country generally during the months in question, and many railroad companies fell behind fifty to sixty per cent in supplying their patrons with shipping facilities, defendant among others; car manufacturing companies were behind with their orders and railway companies could not obtain more cars to handle the accession of business; the officers of this company who were charged with looking after the matter, distributed as rapidly and equitably as possible, cars to the different stations along its lines, including the line over which plaintiff shipped and to the different patrons at each station; they had 150 flat cars on the line to use for the carriage of logs in the district where plaintiff shipped and 175 coal cars were used for hauling logs out whenever they hauled coal into the district; in making this distribution plaintiff was treated like other shippers and his due proportion of cars of the kind he needed was al-

lotted and furnished him as promptly as possible; as lumber was high in price, there was an enormous increase in the demand for cars to carry timber; there was a "car famine" in 1907. Another witness said there were 127 stations from which defendant took out logs in the Terry district and from forty to forty-five cars to distribute daily thereon. On this issue of fact the testimony for plaintiff went to prove there had been a deficiency of cars at the station of Terry for two or three years anterior to the summer and fall of 1907, and plaintiff and others engaged in the same business had been unable often during that period, to procure cars when they needed them. Some of the testimony for plaintiff went to prove there was a better supply of cars during the summer and fall of 1907 than for some time before, though the supply always had been inadequate. The effect of this evidence, if believed, was to show the deficiency of cars was not due to an extraordinary accession of business, but because defendant failed to keep on hand enough cars to supply the ordinary demands of shippers. The verdict was in plaintiff's favor for \$507.96, and defendant appealed.

Defendant filed a motion to compel plaintiff to make his petition more specific, saying the petition averred plaintiff had placed for shipment at Terry, during the months mentioned, 120,000 oak and 60,000 cypress logs, but had failed to state what quantities of logs he had placed at said station for shipment on different dates, where the same were to be shipped, the character of the cars required for them, the market price of the timber for which cars were required, either at the point of shipment or point of destination, when he made application for cars, or how many he desired for each shipment; all of which particulars defendant alleged should have been given and the court was prayed to require plaintiff to give them. This motion was overruled and an exception saved. The other points raised on appeal are that the court erred in not sustaining

a demurrer to the case made by plaintiff, in receiving testimony from the witnesses for plaintiff tending to prove there was no unusual shortage of timber cars on defendant's line of railroad at the station of Terry and other stations in the vicinity, during the months mentioned, but there had been an inadequate supply of cars for two or three years before; erred also in disregarding the testimony of the witnesses for defendant, and all competent testimony, which went to prove the cause of plaintiff's not being supplied with cars as he needed them, was the unusual and great increase of business on defendant's railroad and the lines of other companies in 1907.

The petition was specific enough as to the quantity of logs, their value and the two kinds offered for shipment by plaintiff during the four months from July to October, 1907, inclusive. It also alleged that on numerous occasions plaintiff asked for cars but failed to get them, and defendant failed to furnish plaintiff cars in which to ship the logs mentioned or any of them, and in consequence they (the logs) became damaged and decreased in value, as the market meanwhile declined. The effect of those allegations was to state a case for not furnishing cars to haul any of the logs during the months named, and this was "a plain and concise statement of the facts constituting a cause of action." [R. S. 1899, sec. 592.]

The motion for a more definite petition asked to have one fact given which the petition already gave, *i. e.*, the place to which the logs were to be shipped. In the petition nothing was said about the logs being delivered for separate shipments on different dates, but the motion took this for granted in asking that plaintiff be required to set forth the quantity he had on hand "for each particular shipment and the dates thereof." The court could not know the logs were tendered on various days for separate shipments; hence said part of the motion was bound to be overruled. In the petition

it is averred plaintiff "frequently and on numerous occasions made demand of defendant and on its duly authorized agents for cars on which to load and ship said logs, and defendant promised to furnish them but did not do so," etc. It is to be observed that, read in connection with the preceding portion of the petition, the natural meaning of the averment of frequent demands, is that demands were preferred frequently for cars to haul all the timber previously alleged to have been "placed for shipment over defendant's railroad," and not for cars for separate shipments; though in point of fact demands were made at different dates for so many cars to haul so much timber then at the station ready to be shipped; for logs accumulated in quantity during the four months and plaintiff testified he asked for cars every day. But it is certain the petition does not either expressly or inferentially so say and instead states the facts in the way we have said. With the petition in that form, the court could not assume, against its averments, that plaintiff asked for allotments of cars on different days to haul whatever logs were on hand when the request was made. The value of the two species of logs when ready to ship and a depreciation in value during the period they lay at Terry for lack of cars, were alleged. These allegations were definite enough to enable defendant to prepare its defense so far as the measure of damages was involved, and it had no right to call on plaintiff to allege the market prices, either at Terry or the intended destination of the timber. Defendant would be presumed to know what kind of cars were needed to haul the logs; its business as a common carrier required it to be informed about such matters. Therefore it was not incumbent on plaintiff to designate in his petition "the character of cars required to ship the same" (the logs). The only request in the motion which is worthy of attention as being for information which it was defendant's right to receive in order to meet the gravamen of the case related to

the dates on which he made applications for cars. What we have said already disposes of this point. If it had appeared on the face of the petition the frequent requests were for allotments of cars to carry different deliveries of logs, perhaps the point would have been well taken. But the import of the petition being to the contrary, the proper method of raising the objection in hand, if it is sound, as to which we do not decide, was by objecting to evidence on the ground several causes of action were united in the petition, but not separately stated so as to be distinguished. [1 Mo. Ann. Stat., sec. 593 and notes.] We may say the result showed defendant's rights were not prejudiced by omitting this information from the petition, because the evidence introduced in defense was general inability to furnish cars as promptly as needed during the months in question, and not ability to do so at times and inability at others. It is likely the motion was waived by answering and going to trial, but we have preferred to treat it at large in view of the state of the decisions of the Supreme Court on the point. [Shohoney v. Railroad, 122 S. W. 1025.]

Taking up the appeal on the merits, we hold it would have been a good defense if an extraordinary increase of business on defendant's line, which could not have been anticipated and provided for by using judgment and diligence, had prevented defendant from furnishing the cars. Railroad companies are expected to be prepared with an equipment necessary to handle the average traffic over their lines and such an increase as would be expected by managers of experience, for the volume of traffic will vary with the seasons and general business conditions. These contingencies ought to be provided for and the law requires them to be; but a railroad carrier need not be ready to handle any accession of business, however great, which some unforeseeable condition may cause; and in case an extraordinary

traffic occurs and consequent congestion of freight, the carrier must distribute its cars at the various stations in proportion to their needs. [Dawson v. Railroad, 79 Mo. 296.] The court granted all the declarations of law requested by defendant in which this limitation on its obligation to serve the public was recognized, yet found the facts against it; and the court might do this as trier of the facts. The evidence was contradictory as to whether fewer than usual of timber cars were furnished shippers in the third district of defendant's system; the district where plaintiff shipped. If the testimony of the witnesses for plaintiff was believed, the shortage had been continuous over several years and was not greater in the summer and fall of 1907 than it had been before; perhaps was less. Moreover, though defendant's trainmaster said there was a "car famine" all over the United States during those months, and particularly a shortage of timber cars on account of the extraordinary demand for lumber and the high price it brought, he left room to believe defendant's supply of that kind of cars was inadequate for the ordinary business of its patrons, as he said there were 127 stations from which lumber and timber were shipped and the company had forty-seven cars, suitable for hauling that kind of material, for daily distribution to those stations.

Defendant contends the witnesses who testified for plaintiff regarding the car shortage in the third district were not competent. Though they were not railroad experts, they were shippers of timber and, presumably, apprised concerning the fact they stated, namely, that there was a deficiency in timber cars for several years prior to 1907, equal to the deficiency that year. This testimony inclined to overcome the defense of an unusual volume of traffic which could not have been foreseen, and to prove a scarcity of cars had existed so long defendant could and should have corrected it.

Lelweke v. Link.

The point is urged that as plaintiff knew in July the company could not furnish cars, but nevertheless continued to haul logs to the station for shipment when aware they would depreciate in value while lying there, he induced his loss. Granting there is truth in this contention, as it is not contended plaintiff knew from the first he could not ship, his conduct was cause, not for denying any redress, but only denying it to the extent he increased the damage by accumulating logs after he knew cars would not be available. No declaration of law drawn on that hypothesis was requested.

The judgment is affirmed. All concur.

ANTON LEIWEKE, Appellant, v. ANDREW J.
LINK, Respondent.

St. Louis Court of Appeals, February 21, 1910.

1. **ROADS AND HIGHWAYS: Private Road: Prescription: Evidence.** In an action to restrain the use of a private way across plaintiff's land, evidence *held* insufficient to show the use of the road was begun or continued under a license from the owners of the land, so as not to be adverse.
2. ———: ———: ———: **Statute of Limitations: Adverse Use for Ten Years.** After the year 1847, when the limitation period of actions to recover real property was reduced from twenty to ten years, the public might have acquired an easement by ten year's open, adverse and uninterrupted use under claim of right.
3. ———: ———: ———: **Section 9472: Prospective Operation.** Section 9472, Revised Statutes 1899, providing that when a road has not been opened by order of the county court no lapse of time shall divest the owner of the fee of his title, unless public money and labor have been expended upon it, does not operate retrospectively, and does not affect rights in a road that had been traveled for forty years before its enactment.

4. ———: ———: ———: Case Stated. A private way may be acquired by prescription, and where defendant and his ancestors occupying the farm now owned by him have used a way across plaintiff's land as appurtenant to their land for three generations without objection or interruption, and it does not appear that their use was under a license from the owners of the land, defendant has an easement in it as a way, and cannot be restrained from using it.

Appeal from St. Louis County Circuit Court.—*Hon. Wm. F. Broadhead*, Special Judge.

AFFIRMED.

J. C. Kiskaddon and *R. L. Shackelford* for appellant.

(1) A parol license may be revoked at any time. *Pitzman v. Boyce*, 111 Mo. 387; *Nelson v. Nelson*, 41 Mo. App. 130. (2) No mere user of a way, however long it may continue, can ripen into an easement. There must be an adverse claim in addition to the user, and this adverse claim must be known to the owner of the servient estate. *Pitzman v. Boyce*, 111 Mo. 387; *Dunham v. Joyce*, 129 Mo. 5; *Nelson v. Nelson*, 41 Mo. App. 130; *Hurt v. Adams*, 86 Mo. App. 73; *Smith v. Sedalia*, 152 Mo. 283. (3) To constitute a title to an easement by prescription four things must concur: First, user for a period of ten years or more; second, the user must be adverse; third, it must be under a claim of right; and, fourth, notice must be conveyed to the owner of the servient estate of the character of the user, and of the claim of right. *Anthoney v. Building Co.*, 188 Mo. 704; *Pitzman v. Boyce*, 111 Mo. 387; *Vaughan v. Ruppel*, 69 Mo. App. 583; *McCune v. Goodwillie*, 204 Mo. 306. (4) The burden is on the party claiming title to an easement by prescription to show by satisfactory evidence the adverse character of the user, at what time the adverse user began, that it was used under a claim of right, and that the owner of the servient estate had notice of the

adverse character of the user and of the claim of right. In other words, the claimant of an easement must affirmatively prove his title, and mere user alone is not sufficient. *Anthoney v. Building Co.*, 188 Mo. 704; *Lumber Co. v. Jewell*, 200 Mo. 707; *Hunnewell v. Burchett*, 152 Mo. 611; *Hunnewell v. Adams*, 153 Mo. 440; *Smith v. Sedalia*, 152 Mo. 283. (5) Even where the owner of a servient estate has permitted the public to use a way across his land for a long period of time, yet the burden is on the public or other person asserting an easement by prescription to show that such user is adverse, under a claim of right and that the owner of the servient estate had notice of the character of the user, and of such claim of right. *Chillicothe v. Bryan*, 103 Mo. App. 409; *Field v. Mark*, 125 Mo. 502. (6) And the fact that the claimant has expended money or labor on the alleged easement so as to make it more useful to himself is not sufficient to make the use adverse. *Pitzman v. Boyce*, 111 Mo. 387; *Lead Co. v. White*, 106 Mo. App. 222. (7) A tenant for life can do no act, however solemn, which will, in any way, affect the title of the remainderman. So that notice to a life tenant of an adverse claim to an easement, or even the consent, express or implied, of such life tenant to an adverse user, would not in any way affect the remainderman. 2 *Ency. Law and Prac.*, 481, 482, 484; *Salmon v. Davis*, 29 Mo. 176; *Foote v. Sanders*, 72 Mo. 616; *Keith v. Keith*, 80 Mo. 125; *Hall v. French*, 165 Mo. 430. (8) The statute declares what evidence shall be necessary to establish the existence of a public way. Among other things it provides, that "no lapse of time shall divest the owner of his title to his land, unless, in addition to the use of the road by the public for the period of ten consecutive years, there shall be public money or labor expended thereon for such period." R. S. 1899, sec. 9472.

R. H. Stevens for respondent.

(1) The open, notorious and continuous adverse use of a road by the public for ten years conclusively establishes an easement of way in the public. *State v. Walters*, 69 Mo. 463; *State v. Wells*, 70 Mo. 635; *State v. Proctor*, 90 Mo. 334; *Price v. Breckinridge*, 92 Mo. 370; *Powers v. Dean*, 112 Mo. App. 288; *Boyce v. Railroad*, 168 Mo. 583; *Delaney v. Railroad*, 168 Mo. 599; *Turner v. Railroad*, 112 Mo. 542. In the case at bar the public used the road uninterruptedly as a highway for fifty-five years, and in addition to said use they have for the last thirty-two years kept it in repair by working it once a year and sometimes twice a year. These facts make the use adverse and the claim open and notorious, and the burden is on plaintiff to show that the use began by permission and continued by permission to the present time. There is no such evidence in the record. (2) If one grants a close which is not accessible to a public road except over his own land he impliedly grants with it the right of passing over that land. *Chase v. Hall*, 41 Mo. App. 15. In this case William H. Coleman sold to the plaintiff a tract of land, and its only outlet to a public road was the road in suit, which passes by the land sold, over the land of William H. Coleman, the grantor, to the Wild Horse road, and consequently regardless of the right of the public or the right of the plaintiff to use this road by prescription, the plaintiff has an implied grant from the owner of the land over which the road runs to the public road. (3) The fact that Mr. Locker, at one time owner of the land through which the road runs, for convenience to himself, built a fence on the hill and at Wild Horse Creek road and put gates across the road, does not in any way affect the right of the public in the road by prescription, nothing else having been done to interfere with its use. *Powers v. Dean*, 112 Mo. App. 288.

GOODE, J.—The petition describes a road or way lying in St. Louis county and extending from a public road, known as Wild Horse Creek road, across plaintiff's farm to defendant's farm, alleges the latter, without leave or license, has entered on plaintiff's land, has used frequently and threatens to continue to use the way across said land for the purpose of passing to and fro with wagons, horses and cattle, and at different places has wrongfully graded parts of the road or way, deposited on it broken stone or gravel, thereby depriving plaintiff of the use of part of his land, and threatens to continue this course of conduct to the irreparable injury of plaintiff. The prayer is for a writ of injunction restraining defendant, his agents, servants and employees forever from entering on said way, using any way across said land for any purpose, or depositing thereon any stone, gravel or other substance. The farms of the two parties adjoin, and defendant's way of egress from his farm to the public road known as Wild Horse Creek road is along the road in controversy across the southern portion of plaintiff's land into Wild Horse Creek road. After stating a general denial, the answer avers the way in question had been used by defendant and those under whom he claims for more than twenty years prior to the institution of the present action as a road to and from defendant's farm to Wild Horse Creek road, and defendant has acquired by prescription the right to use and occupy said road and keep it in repair. Prior to 1885 W. H. Coleman, who died during said year, owned the fee-simple of the land over which the way in question extends. He devised the land by will to his wife for her life, with remainder over to his children. The interests of the remaindermen were conveyed to plaintiff before the death of the widow or life tenant, which occurred in 1905, when plaintiff became the owner of the entire fee. The evidence is harmonious and shows the way in controversy has been used by residents of the neighborhood and any one else who wished, time out

of mind. Witnesses seventy-two and seventy-five years old testified it was a traveled road in their boyhood and as far back as they could remember, but exactly when it began to be traveled was not proved, and likely it has been since that portion of the country was settled. Certainly it has been continuously for sixty years or more by all persons who had occasion to go over it, by defendant and his ancestors for at least three generations, and the like period by other families in the vicinity. In early days the road was used as an outlet to Wild Horse Creek road and thence along the latter to a ferry known as Glade's Ferry, which was across the Missouri river at or near the village of Port Royal in Franklin county; but the way in dispute and the farms of the litigants lie in St. Louis county near the line between the two counties. A long time ago there was a mill on the river which people dwelling near this road reached by traveling over it. For an indefinite period before the year 1877 gates stood across the road at either end, one close to Wild Horse Creek road and the other at defendant's end. These gates were put in by the man who then owned the land the road crossed in order to enable him to use his adjacent fields as a pasture for stock, but the gates did not interfere with travel and people passed through them at will. A stock law went into effect in St. Louis county in 1877 and thereafter the gates were not used on the road. For a while, too, before the Civil War, the road was fenced off from the fields and was then known as Bly's Lane. It is the only outlet from defendant's farm and those of some other proprietors. The people who use it have worked it occasionally for years past, to keep it in good condition for travel, but it never has been worked by the county authorities. Plaintiff bought the fee of the land knowing of the use of the road by the citizens of the neighborhood and the general public, and that this use had continued as long as the oldest citizens could remember without question or remonstrance on the part of plaintiff's predecessors in title. Years ago, but how

many is not shown, a church was built beside the way three or four hundred feet from Wild Horse Creek road and since then the way has been used by people who attended the church. Plaintiff contends the use of the road was under a license from the owners of the servient estate; hence was never adverse so an easement was acquired by prescription to use it, either as a public or a private way. Nothing appears to support this view except the fact that for a while during the long period the road was traveled, there were gates across it. But the evidence indicates that previously it was without gates and those across it later were erected by the owner of the fee at the time, not as a licensor of the road who might control its use or to show it was traveled by his permission, but to render fields which bordered on it useful for pasturage. And so during another period the road was fenced off from the adjacent lands as a lane, a circumstance tending to show the then owner of the servient lands regarded the strip as subject to a public, or at least a neighborhood, easement and even might be argued to prove an intention to dedicate the strip to use as a highway. The changes in the form of the way were such as might be expected during the course of its history, and likely grew out of the thinner settlement of the country in early days, the slighter value of land and a disposition on the part of the owners of the fee and his neighbors who used the road most, to be mutually accommodating and adapt the use as much as possible to the welfare and convenience of every one concerned. No proprietor prior to plaintiff objected to travel over it and we find nothing in the record which, when fairly construed, tends to prove it was traveled or repaired by permission of the owner of the fee, either originally or at any interval. On the contrary, the impression is left that all parties acquiesced in its use as a matter of immemorial right. For several generations past some farms had been dwelt on and tilled without having another outlet provided or their right denied; a circum-

stance directly pointing to a belief that the road was of right available to the occupants of those farms, when we remember how often neighborhood roads are shifted and how prone proprietors become, as land grows valuable, to include in their fields strips used as roads by permission. After the year 1847, when the limitation period of actions to recover real property was reduced from 20 to 10 years, the public might have acquired an easement in the road by ten years' open, adverse and uninterrupted use under claim of right. [State v. Walters, 69 Mo. 463; Fugate v. Pierce, 49 Mo. 441, 447; Callaway Co. v. Nolley, 31 Mo. 393.] A statute enacted in 1887 and which now appears in the Revised Statutes of 1899 as section 9472, is invoked by plaintiff's counsel as preventing acquisition of an easement by the public. The statute said that when a road had not been opened by order of the county court, no lapse of time should divest the owner of the fee of his title, unless, in addition to the use of the road by the public for ten consecutive years, there should have been public money and labor expended on it. We are not called on to expound that law further than to say it does not purport to operate retrospectively and the road in question had been traveled for forty years or more before its enactment; hence, whatever right the public could acquire by user had been acquired before the statute took effect. [State ex rel. v. Thompson, 41 Mo. 25.] But for the purposes of this case we need not decide the road had become a public one by use, for the primary point at issue is whether defendant has an easement in it as a way, and of this, at least, there can be no doubt. As said, he and his ancestors occupying the farm now owned by him, have used the way as appurtenant to their land for three generations and probably since the country was sufficiently settled for courses of travel to become beaten. A private way may be acquired by prescription, as was ruled in Autenrieth v. Railroad, 36 Mo. App. 254, 260; a case very like the one at bar and a precedent to be followed.

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The prescriptive time, which was twenty years when the easement began to be used, is now ten; but in any event the use has been so long and constant as to put it beyond question that defendant owns the easement, as there is no proof the travel began by permission of the fee owner, and all the evidence suggests the contrary.

Plainly the judgment of the court was for the right party and it is affirmed. All concur.

J. W. STOUT, Respondent, v. CARUTHERSVILLE
HARDWARE COMPANY, Appellant.

St. Louis Court of Appeals, February 21, 1910.

APPELLATE PRACTICE: Judgment Sustained by Substantial Evidence. Where a judgment is sustained by substantial evidence it will not be disturbed on appeal on issues of fact.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

AFFIRMED.

Faris & Oliver for appellant.

Ward & Collins for respondent.

GOODE, J.—A full statement of the facts of this case will be found in the opinion given on the prior appeal (131 Mo. App. 520, 110 S. W. 619) the record before us now not being materially different from the one we then reviewed. We deem it unnecessary to burden the books with a restatement of the case, as no proposition of law is presented on the present appeal. But two points are pressed on our attention as grounds for a reversal of the judgment of the court below, to-wit, that when defendant's manager, Dorroh, sold the goods in

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controversy to plaintiff's agent Powell, the former did not know Powell represented plaintiff, and the second point is, that plaintiff did not make a demand for an abatement from the prices charged for the goods on the ground those prices were extortionate and not in conformity to the agreement upon which they were sold, until after the amount charged had been paid, though he was apprised of the prices before payment was made. The evidence is contradictory on both these points. There can be no question that there was substantial testimony given to prove Dorroh sold the goods to Powell, knowing the latter represented Stout. Neither can there be any question there was substantial testimony tending to prove Stout was not aware he had been overcharged, until after Spangler had paid the bill for him, and that he demanded reimbursement as soon as he learned the fact. We refer to the former opinion for a recital of the evidence necessary to an understanding of the points now determined. There is no merit in them and the judgment will be affirmed. All concur.

**A. B. HUNTER, JR., Respondent, v. ST. LOUIS
SOUTHWESTERN RAILROAD COMPANY, Ap-
pellant.**

St. Louis Court of Appeals, February 21, 1910.

- 1. APPELLATE PRACTICE: Conflicting Testimony.** The appellate court will not weigh conflicting testimony.
- 2. COMMON CARRIERS: Carriage of Stock: Negligence: Recovery on Theory not Pleaded.** Where the only cause of action declared on in the petition was defendant railroad's negligent failure to transport plaintiff's hogs promptly, plaintiff could not recover for injuries to the hogs while being loaded or unloaded by defendant's employees.

Hunter v. Railroad.

Appeal from New Madrid Circuit Court.—*Hon. Henry C. Riley*, Judge.

REVERSED AND REMANDED.

S. H. West and Wammack & Welborn for appellant.

(1) When a party bases his action on specific negligence, he must prove the negligence relied upon and that the injury resulted from it. *Hurst v. Railroad*, 117 Mo. App. 37. And he must recover, if at all, on the cause of action stated in the petition and not on one stated in the reply. *Mathieson v. Railroad*, 118 S. W. 12; *Milliken v. Com. Co.*, 202 Mo. 654. (2) When animals are shipped under a written contract, such as the one in this case, the giving of the notice, required by the contract, is a prerequisite to the right of recovery on account, of damaged condition, shrinkage, fall in market, or loss occasioned by the death of any of the animals. *Smith v. Railroad*, 112 Mo. App. 614; *Bank v. Railroad*, 119 Mo. App. 14; *Bellows v. Railroad*, 118 Mo. App. 500; *Freeman v. Railroad*, 118 Mo. App. 530; *Meriweather v. Railroad*, 128 Mo. App. 647.

Traylor & Baker for respondent.

Respondent recovered on the cause of action stated in his petition, he alleged negligence and carelessness in the premises and an unreasonable delay in transporting said hogs, and bad condition by reason thereof, the court found that the testimony bore out these facts and so found. Again should plaintiff recover judgment on his reply, and defendant made no objection in the trial court, that the reply departed from the petition, could not be heard to assign for error, that the plaintiff's judgment is not supported by his petition. Defendant made no objection in the case at bar. *Phillips v. Barnes*, 105 Mo. App. 421.

GOODE, J.—Action for damages suffered by delay in the transportation of a carload of eighty-three hogs, shipped from LaForge, in New Madrid county, to East St. Louis, Illinois. It is averred the usual time for transportation between said points was twenty-four hours, but about fifty hours were consumed in transporting plaintiff's hogs; that in consequence eight of them died en route, causing plaintiff to lose \$172.90; the remainder sold at ten cents a hundred pounds less than they would have brought if in good condition; that said condition was due to their being stiff and sore, thus causing a loss to plaintiff of \$19.26; that the market for hogs like plaintiff's had gone down fifteen cents a hundred pounds during the delay, thereby entailing a loss on plaintiff of \$28.89, and the hogs which went through lost 1500 pounds in weight, whereby plaintiff was damaged \$99.75.

In this case, and probably in half those submitted to us, an assignment of error is made which comes down to a demand that we weigh conflicting testimony, and it seems impossible by endless iteration to induce counsel to refrain from urging this contention. The evidence is overwhelming in the present case to show a delay occurred in the transportation of the hogs and damage was suffered in consequence.

It is further contended that though the only cause of action declared on in the petition was negligent failure to transport the hogs from the point of shipment to destination in twenty-four hours when by reasonable diligence this could have been done, instead of fifty hours being consumed, the court allowed plaintiff to recover for other reasons, and this point is well taken. The first declaration of law granted for plaintiff permitted a recovery not only in the event defendant was found to have delayed the carriage of the hogs from negligence, but also in case it was found the employees of defendant injured the animals while loading or unloading them on the way. As nothing was said about

negligence in this respect in the petition, defendant was not called on to meet the issue and the supposed fact should not have been predicated in the declaration as a ground for a verdict in plaintiff's favor. [Mathieson v. Railroad, 219 Mo. 542, 118 S. W. 9: Milliken v. Com. Co., 202 Mo. 637, 100 S. W. 604.]

The judgment is reversed and the cause remanded.
All concur

**McKNIGHT-KEATON GROCERY COMPANY, Ap-
pellant, v. HUDSON & CARTE, Defendants, S. J.
HUDSON, Interpleader, Respondent.**

St. Louis Court of Appeals, February 21, 1910.

1. **APPELLATE PRACTICE: Instructions: Erroneous Instruction not Harmless, Where Evidence is Conflicting.** In proceedings questioning the validity of a sale of a stock of goods on the ground of fraud as to creditors, where the evidence as to fraud was conflicting and would support a finding either way, an erroneous instruction cannot be held harmless on the ground the verdict was for the right party.
2. **FRAUDULENT CONVEYANCES: Purchase of Failing Firm's Assets: Purchaser's Intent to Defraud Creditors not Material, When: Instructions.** In a suit by attachment on the ground a debtor firm had fraudulently conveyed its property so as to hinder and delay its creditors, where a purchaser filed an interplea claiming the goods by virtue of a purchase he alleged was made in good faith, an instruction granted at his request which in effect told the jury that, though they believed the debtor firm made a sale to the interpleader for the purpose of defrauding plaintiff, nevertheless the finding should be for the interpleader, unless the jury also found he had knowledge of the fraudulent intent of the debtor firm and bought for the purpose of aiding them to hinder, delay and defraud their creditors, was erroneous, there being nothing in the case which made applicable the doctrine that one creditor of a failing debtor may obtain preferential settlement of his claim even though he knows the intention of the debtor is to delay or defraud other creditors.

3. ———: ———: Voluntary Purchaser: Facts Stated. In such a case, where the interpleader testified he had paid \$1600 for the goods purchased, \$460 of which amount was deducted to secure an indebtedness owing to him by the vendor firm, and the balance paid in money, and further testified he thought the firm was solvent and owed nothing but several small obligations which were paid, he stands as a voluntary purchaser and not as a creditor forced by an emergency to acquire all his debtor's property to secure his own demand to the exclusion of other creditors.
4. ———: ———: ———: Knowledge of Intent. The sale of the assets of a failing firm to a volunteer purchaser, who knew the firm in making the sale contemplated a fraud on its creditors, is fraudulent and void.
5. ———: ———: ———: Intent to Defraud not Material. Though a creditor of a failing debtor, who has a bad intention towards other creditors, may take over such portion of the latter's property as will pay or reasonably secure his debt, if he does not aim to assist in a fraudulent scheme, yet if the creditor acquires a grossly excessive amount of property in proportion to his demand, knowing of the tortious purpose of the debtor, the transaction is invalid as to other creditors, even though the creditor who obtained the preference paid full consideration for the excess of property.

Appeal from Pemiscot Circuit Court.—*Hon. Henry O. Riley*, Judge.

REVERSED AND REMANDED.

Ward & Collins for appellant.

(1) Where a purchaser buys property from a debtor and pays its value for it, if the sale is made by vendor with fraudulent intent to defeat his creditors and the purchaser knew of that fraudulent intent, then the sale will be void; and the purchaser is not required to participate in that fraud, knowledge is sufficient. *Dougherty v. Cooper*, 77 Mo. 528; *Ironholt v. Hartwig*, 70 Mo. 485; *Hill v. Taylor*, 125 Mo. 331; *Frederick v. Allgaier*, 88 Mo. 598; *Sammons v. O'Neill*, 60 Mo. App. 530; *Kurtz v. Troll*, 175 Mo. 506. (2) A sale made to a creditor

to pay an indebtedness to that creditor is good even if made with an intent on part of vendor to defraud other creditors, unless such purchaser participated in the fraud; but the purchaser is not permitted to buy more goods than satisfies his claim. *McNichols v. Rubleman*, 13 Mo. App. 515, 520; *Shelley v. Boothe*, 73 Mo. 74; *Kurtz v. Troll*, 175 Mo. 511; *Albert v. Besel*, 88 Mo. 150.

(3) Where a purchaser appears in the transaction in a dual capacity, both as a preferred creditor and a volunteer purchaser, then the rule as to volunteer purchaser governs; that is to say, a sale will be held fraudulent as to such creditor of the vendor, if the purpose of the latter in making a sale was to hinder or delay his creditors and the purchaser knew of such intention, although he did not participate therein. *Mercantile Co. v. Troll*, 79 Mo. App. 558; *Kurtz v. Troll*, 175 Mo. 513.

Duncan & Bragg for respondent.

Conceding for argument's sake only, that the instructions given by the trial court at the instance of respondent were erroneous, still, under the evidence, this court would not be justified in reversing and remanding the cause, as the verdict is the only one that could have been found consistent with the evidence. It is a well-settled rule of law that a judgment may be affirmed on appeal, although infected with error, if it be apparent that a reversal would prove ineffectual and of no benefit to the party asking it, as where the court can see that the same result would inevitably be reached the second time. *Henry v. Railroad*, 113 Mo. 538; *Daniel v. Atkins*, 66 Mo. App. 342; *State ex rel. v. Branch*, 151 Mo. 643; *Fitzgerald v. Barker*, 96 Mo. 665; 3 Cyc., p. 420, 421; *Vogg v. Railroad*, 138 Mo. 180; *Greer v. Bank*, 128 Mo. 575.

GOODE, J.—This case was here on a prior appeal from another judgment in favor of interpleader (116 Mo. App. 551) which was reversed for an erroneous in-

struction and we regret to be compelled to reverse it again. The interpleader, S. J. Hudson, purchased a stock of goods, store accounts, one horse and three head of cattle, belonging to Lee Hudson and Emery Carte, doing business under the firm name of Hudson & Carte. Shortly after the purchase by S. J. Hudson and on August 28, 1903, plaintiff, McKnight-Keaton Grocery Company, attached the merchandise on an affidavit that the firm had fraudulently conveyed and assigned their property so as to hinder and delay creditors. The goods levied on by the sheriff were sold by order of the court and bid in by the agent of the plaintiff for \$150. S. J. Hudson filed an interplea in the attachment suit, claiming the goods by virtue of his purchase, which he alleged was made in good faith and that the defendants in the attachment action had no interest in them when the writ was levied. This appeal was prosecuted from the judgment given in his favor on a trial of the issues tendered by the interplea. To render our decision clear, more of the facts not developed on the former appeal must be recited. Interpleader bought the goods, accounts and live stock on August 6, 1903, for \$1600 and the assumption by him of some small bills the firm owed, and immediately took possession; the purchase price being paid by deducting from the total amount \$400 which the firm owed interpleader for borrowed money, and \$61 the firm or Lee Hudson owed him, paying Lee Hudson \$539 in money and Carte \$600 in money. The horse was valued at \$100, the cattle at about \$50, the book accounts and stock of merchandise each at half the balance of the total price paid (\$1600). Interpleader testified he lent the firm \$400 three weeks before the purchase and an account of \$61 due him had been collected by the firm or his brother, thus making the \$461 due him, and which was deducted from the price he was to pay. In the deal the accounts acquired by interpleader were valued at ninety cents on the dollar, though they ranged in amount from one to thirty dollars, and were

against many persons, mostly employees in sawmills thereabouts, some of whom were unknown to interpleader. The merchandise, though it was not fresh stock, was valued at one hundred cents on the dollar. It looks like the firm was in failing circumstances, as its indebtedness to plaintiff, interpleader and others, amounted to \$800 or more, which was about the value of the merchandise on hand according to the evidence most favorable to interpleader, while that for plaintiff showed the stock was a remnant worth \$250 or \$300. Testimony for interpleader is that a careful invoice of the stock was taken before the purchase was made; whereas for plaintiff the testimony tends to prove no invoice was taken, but the goods were bought by interpleader after a brief negotiation of ten minutes and in the night; that interpleader showed a witness an itemized invoice some time after the sale, showing the stock to be worth \$350 and interpleader offered to sell it to the witness for \$270. The cross-examination of interpleader inclines to prove he did not have the cash to make the payment to Lee Hudson and Carte he said he made. Those men left the village of Pascola, where the store was, the night of the sale or the next day; in fact left the state. They owed plaintiff a bill of \$320 which was left unpaid and may have owed other unpaid debts. Interpleader testified he bought the stock of merchandise for the purpose of enabling his brother Lee Hudson, who was in poor health at the time, to get out of business and go where the climate would suit him better; that he (interpleader) inquired about the debts of the firm and was told it owed nothing except a small amount for some tobacco, crackers and two barrels of oil, which he agreed to pay and did pay. No clear explanation was given of why the bill due plaintiff was not brought to interpleader's notice during the negotiation for the sale. Lee Hudson said he did not know the firm owed it as he was sick and did not give much attention to the books. The facts in proof would support

findings that the firm sold out in consequence of its insolvency and of fraud in the sale, participated in by all the parties to it; as they would support the finding of an innocent transaction. Hence we cannot accede to the proposition advanced by counsel for interpleader that if the jury was erroneously instructed, the error was harmless because the record demonstrates the verdict was for the right party. The error assigned is upon the instructions granted at his request, which, in effect, told the jury that though they believed Hudson and Carte made the sale to the interpleader for the purpose of defrauding plaintiff, nevertheless the finding should be for interpleader unless the jury also found he had knowledge of the fraudulent intention of Hudson & Carte and bought for the purpose of aiding them to hinder, delay or defraud their creditors. In other words, the instructions for interpleader proceeded on the theory that in order for him to be defeated, it was necessary for the jury to find not only that he knew the firm of Hudson & Carte were selling to him with an intent to hinder, delay or defraud their creditors, but that he participated in their fraudulent purpose and aimed to assist them in achieving it. On the contrary the instructions granted at the instance of plaintiff, proceeded on the theory that to defeat interpleader it was necessary only to prove the sale was made by Hudson & Carte with the intent to hinder, delay or defraud their creditors, and the interpleader, at the time of the purchase, knew of such intent on their part. Perusal of the transcript has convinced us there is nothing in the case which made applicable the doctrine that one creditor of a failing debtor or firm, may obtain preferential settlement or security for his claim, by having property of the debtor turned over to him, even though he knows the intention of the debtor is to hinder, delay or defraud other creditors, provided the only purpose of the creditor obtaining the preference is to protect himself from loss and he does not intend to assist the debtor

in carrying out the fraudulent purpose as to other creditors. [Forrester v. Moore, 77 Mo. 650; State to use v. Mason, 112 Mo. 374, 20 S. W. 629.] The interpleader's own testimony does not tend to put him in the position of a creditor of a failing concern who was endeavoring to obtain security for his demand. He testified he thought the firm was solvent and owed nothing but the small obligations we have mentioned; that his purpose in buying was to enable his brother to seek a locality more favorable to his health; that Lee Hudson had endeavored at first to sell only his interest in the business, but interpleader refused to buy unless he could buy the entire business. On the record interpleader stands as a voluntary purchaser, and not as a creditor forced by an emergency to acquire all his debtor's property in security for his own demand to the exclusion of other creditors. As a volunteer purchaser, it was sufficient to render the sale fraudulent and void as to other creditors, if interpleader knew the firm, in making the sale, contemplated a fraud on other creditors, even though his purpose in buying the stock was to assist his brother to go where the climate was more suitable. The parties have briefed the appeal on the assumption that interpleader was both a purchaser and a creditor seeking satisfaction of his claim. It is not shown the latter purpose operated at all to influence him to buy; but the cases indicate that, as he was a creditor only to the amount of \$461 and paid \$1600 for the property he purchased, the same rule of decision would prevail if his motive had been to avoid losing his claim. [Esselbruegge Merc. Co. v. Troll, 79 Mo. App. 558; Smit v. Saddlery Co., 64 Mo. App. 120; State to use v. Frank, 22 Mo. App. 46; McNichols v. Richter, 13 Mo. App. 515.] Though a creditor of a failing debtor who has a bad intention toward other creditors, may take over such portion of the latter's property as will pay or reasonably secure his debt, if he does not aim to assist in a fraudulent scheme, yet if the creditor acquires a gross-

ly excessive amount of property in proportion to his demand, knowing of the tortious purpose of the debtor, the transaction is invalid as to other creditors, even though the creditor who obtained the preference paid full consideration for the excess of property; for by the payment he assists the debtor to defraud other creditors. [Cases *supra*.] This is the declared doctrine in Missouri, but perhaps an emergency might occur in which the rule would be relaxed, as it has been in some jurisdictions. [Wood v. Keith, 60 Ark. 425; Fly v. Screcton, 64 Ark. 184, 41 S. W. 764; Maddox v. Reynolds, 69 Ark. 541, 64 S. W. 266; Levi v. Williams, 79 Ala. 171.] As to this question we do not decide, for the case calls for no decision of it. The instructions given for interpleader were so drawn as to make plausible an argument to the jury, that although interpleader knew the purpose of the sellers was to hinder or defraud creditors, yet if his motive was simply to assist his sick brother, the sale was valid; and the jury could have found their verdict on that theory without disregarding the instructions for interpleader. The two sets of instructions declared contrary doctrines of law.

The judgment is reversed and the cause remanded. All concur.

PETE EDWARDS, Respondent, v. REESE LEE et al.,
Appellants.

St. Louis Court of Appeals, February 21, 1910.

1. **COMMON CARRIERS: Carriage of Live Stock: Delivery of Other Stock.** In an action against a carrier for damages for delivering inferior cattle to plaintiff's consignee, in place of those shipped by plaintiff, evidence held to sustain a finding that some of the cattle delivered to the consignee as plaintiff's were not shipped by him.

2. ———: ———: **Delivery to Agent Sufficient.** Cattle shipped were delivered to the consignee, when they were receipted for and taken charge of by its agent, and the carrier would not thereafter be responsible for them.
3. **INSTRUCTIONS: Abstract Propositions of Law Should not be Submitted.** An instruction merely stating an abstract proposition of law, though stating it correctly, should not be given, as it affords the jury no aid.
4. **COMMON CARRIERS: Carriage of Live Stock: Proper Delivery Prevented by Act of God or Public Enemy: Instruction: Harmless Error.** In an action against a carrier for damages by breach of the contract of shipment, an instruction that if defendant failed to deliver the cattle to the shipper's consignee in good condition, being prevented only by the act of God or the public enemy, and plaintiff sustained damage by reason of such failure, the carrier was liable, was erroneous, as making it liable, though prevented from delivering the cattle by the act of God or the public enemy; but the error of such an instruction was harmless, where defendant claimed the cattle were, in fact, delivered, and did not defend on the ground they had been lost through such causes.
5. ———: ———: **Delivery of Other Stock: Measure of Damages: Instructions.** In an action against a carrier for damages for delivering inferior cattle to plaintiff's consignee in place of those shipped by plaintiff, it was error to instruct that the jury in assessing damages should take into consideration the difference in the quality of plaintiff's cattle and those he received pay for, according to their market value at the place of destination, and the difference between the weight of the cattle delivered and those shipped by plaintiff, there being no testimony the cattle shipped weighed more than those delivered, and the difference in the quality of the two lots not being a proper element to consider in ascertaining the damages, the proper measure of damages being the difference between the market value of the cattle shipped and those delivered.
6. ———: ———: ———: ———: **Burden of Proof.** In an action against a carrier for damages by delivering inferior cattle belonging to another to plaintiff's consignee, in place of those shipped by him, the burden is on plaintiff to show the market value of the cattle shipped and those delivered as his, so as to enable the jury to determine the difference in assessing damages.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley, Judge.*

REVERSED AND REMANDED.

Faris & Oliver for appellants.

(1) The court erred in refusing to instruct the jury at the close of all the evidence, that under the law and the evidence in this case, their verdict and finding should be for the defendants. *Roberts v. Railroad*, 56 Mo. App. 60; *Peck v. Railroad*, 31 Mo. App. 123; *Mexico v. Jones*, 27 Mo. App. 534; *Reichenbach v. Ellerbe*, 115 Mo. 588; *Jackson v. Hardin*, 83 Mo. 175. (2) Instruction number 3 is erroneous and hurtful to the defendants for many reasons, even if it was possible for the jury to understand its substance and intended meaning: (a) First, the instruction is erroneous because it refers the jury to the pleadings to determine the point of destination of the shipment in question, and also as to the measure of damages. The jury was not advised in this instruction, nor in any other, where the shipment of cattle was to be delivered. The jury was also told that the measure of plaintiff's damages was such as the proof warranted "not exceeding the amount sued for." *Shaw v. Dairy Co.*, 56 Mo. App. 521; *Clark v. Loan Co.*, 46 Mo. App. 248; *Fleischmann v. Miller*, 38 Mo. App. 177; *Commission Co. v. Hunter*, 91 Mo. App. 333. (b) By this instruction, as worded and punctuated, the jury was told or was attempted to be told, that in arriving at the amount of plaintiff's damages, they should take into consideration, should you find (for plaintiff) that plaintiff's damages resulted from a failure of defendants to deliver plaintiff's said cattle, so transported, to plaintiff's consignee, and that plaintiff's said cattle, by reason of said failure were delivered to other and different parties than plaintiff's consignee, and that plaintiff received pay for other and inferior cattle (then) you should take in consideration, the difference

in the quality of plaintiff's cattle, and those he received pay for." *Stanley v. Union Depot Co.*, 114 Mo. 620; *Young v. Ridenbaugh*, 67 Mo. 574; *Legg v. Johnson*, 23 Mo. App. 590. (c) This instruction was erroneous for the further reason that it attempted to tell the jury that the measure of damages was the difference in the market value of plaintiff's cattle and other cattle for which he received pay for in the city of St. Louis, when as a matter of fact and from all the record no competent evidence was offered showing what the market value of the cattle in question or "other cattle for which plaintiff received pay for" was, in St. Louis.

W. W. Corbett and Duncan & Bragg for respondent.

GOODE, J.—Case for damages against defendants as common carriers. Defendants operate a steamboat line on the Mississippi river; they keep boats, among them the *Stacker Lee*, plying between the ports to the south of St. Louis and this city, carrying freight and passengers. Petition alleges plaintiff, on January 23, 1907, delivered to the captain of the *Stacker Lee*, on board the boat at Richard's Landing, eleven head of steers, which were fat and had been corn-fed during the fall and winter and were of the value of \$250; the captain of said boat representing defendants agreed safely to transport said cattle and deliver them to Smith Bros. & Sparks, at St. Louis, Missouri, giving plaintiff at the time a bill of lading which is attached to the petition as part of it; defendants, through said captain and other agents and employees on the steamboat, committed breaches of the contract of shipment, in this: They failed to deliver the cattle according to the contract and said captain and employees permitted the cattle to be delivered to other persons than those to whom they were consigned; allowed plaintiff's cattle to become mixed with other and inferior cattle so his were delivered to

the wrong persons and the inferior cattle delivered to Smith Bros. & Sparks in place of plaintiff's, to his damage in the sum of \$250, for which he prayed judgment. Answer denied the statements of the petition. We have not found the bill of lading in the transcript, but the evidence shows without conflict plaintiff loaded eleven steers on the Stacker Lee at Richard's Landing on January 23, 1907, to be carried to St. Louis and delivered to the consignees, Smith Bros. & Sparks; the cattle were accepted by defendants for carriage on the same morning as were ten head of other cattle belonging to a man named Oakley, which were loaded at the same landing and just prior to the hour when plaintiff's were put on. As to where the two lots of cattle were placed on the boat with reference to each other, there is a conflict, the testimony for defendants being they were put on opposite sides of the boat, either when loaded or shortly after. A witness said one lot was placed on the starboard and the other on the larboard side; whereas the testimony for plaintiff was both lots were put on the same side of the boat and beside each other, being separated by portable gates which were set up to keep them apart. These gates were about four feet high and fastened in some manner to keep them erect, but whether staunchly enough to do that is in doubt. Testimony for plaintiff goes to prove his steers were in fine condition, weighed from 850 to 1000 pounds each and were worth from \$3 to \$3.25 a hundredweight; that Oakley's cattle were all smaller, some of them were heifers and they were worth considerably less per hundredweight; also Oakley's lot would weigh 3000 or 4000 pounds less than plaintiff's lot. Plaintiff testified he remonstrated with the officers of the boat about the condition of the gates between his cattle and Oakley's, saying the gates would not keep the stock apart and they would get mixed, but the officers promised they would prevent this. The boat appears to have reached St. Louis January 26th, for on that day a receipt was

executed in behalf of Smith Bros. & Sparks, by a man named Bender, who, as the testimony goes to prove, was the agent of Smith Bros. & Sparks to receive at the stockyards all stock consigned to said firm. The receipt said that firm had received from the steamer Stacker Lee, in good order, eleven head of cattle; without saying whose they were, but with a notation which indicates they had been shipped from Richard's Landing. The evidence shows said stockyards were where all stock coming into St. Louis by boat for said firm were unloaded. Plaintiff's cattle were taken in charge at St. Louis by the firm of J. A. McNeily & Sons, in behalf of Smith Bros. & Sparks. The boat arrived in the evening, the cattle were unloaded and after being placed in pens in the Independent stockyards (also called the Union Stockyards) and receipted for by Bender, McNeily & Sons took charge of them under an order they held from Smith Bros. & Sparks, authorizing them (McNeily & Sons) to take charge of all cattle consigned to said firm at the stockyards. The lot of cattle turned over to McNeily & Sons as the property of plaintiff, was afterwards sold and plaintiff realized net from the sale \$105. T. E. McNeily, who represented McNeily & Sons in the transaction, testified the cattle were unloaded from the Stacker Lee about 7:30 in the evening, and he took them the next morning; he found in the pen supposed to contain plaintiff's cattle, eight, nine or ten head; the remainder necessary to make out the eleven head were in another pen; he never saw them until they were taken out of the pen and turned over to him; Oakley's cattle, ten head, were sold by another commission company, Blakely, Sanders & Mann; witness saw Oakley's cattle and they were much heavier than plaintiff's; the latter's cattle were all steers except one or two little heifers and one little cow and weighed 6000 pounds; he did not look at the weights of the Oakley cattle, but knew from their appearance they were much heavier than plaintiff's; Oakley's cattle, as

he learned, weighed 8860 pounds. This is the evidence to show the cattle shipped by plaintiff were not delivered to the consignee. For defendants several of its officers and employees on the boat testified that Oakley's cattle and plaintiff's were loaded on different sides of the boat, were kept apart during the whole trip, were unloaded into separate pens at St. Louis, plaintiff's cattle and the very ones shipped from Richard's Landing were turned over to Bender for Smith Bros. & Sparks and Oakley's cattle were delivered to another consignee. More than three hundred cattle were carried to St. Louis on the boat. The evidence for defendants on the issue of the delivery of the cattle shipped by plaintiff was positive and unequivocal, and they asked the court to direct a verdict for them, but this request was refused. The following instruction, among others, was given to the jury at plaintiff's instance, and complaint is made of it by defendants: .

"The court instructs the jury that if you believe and find from the evidence that on or about the 23d day of January, 1907, the plaintiff contracted with the defendants, through their agents or legal representatives to transport 11 head of cattle, said cattle at the time being in good condition, on the Mississippi river, from Richard's Landing in Pemiscot county, Missouri, to the city of St. Louis, Missouri, which cattle were consigned to Smith Bros. & Sparks, and that said cattle were delivered to the defendants, through their authorized agent, or legal representatives in good condition, and by them placed on board the steamboat Stacker Lee, the said boat being in charge of defendants' agents, servants, and employees, and that defendants failed to deliver said cattle to the plaintiff's consignees in good condition, as per their said contract, being prevented only by the act of God or the common enemy, and that by reason of the failure of the defendants so to deliver said cattle, you find and believe from the evidence the plaintiff has sustained damage, you will find

for the plaintiff in such sum as the proof shows he has been damaged, not greater than the amount sued for; and in estimating the plaintiff's damage you should take into consideration, should you find that plaintiff's damage resulted from a failure of defendants to deliver plaintiff's said cattle so transported, to plaintiff's consignee, and that plaintiff's said cattle, by reason of said failure were delivered to other and different parties than plaintiff's consignee, and that plaintiff received pay for other and inferior cattle, you should take in consideration the difference in the quality of plaintiff's cattle and those he received pay for, according to their market value, in the city of St. Louis, and the difference in the weight of the cattle."

These instructions were given at defendants' instance:

"The court instructs you that upon the plaintiff rests the burden of proof and unless you believe and find from the evidence that the plaintiff has proven the issue of facts and the allegations of his petition by the greater weight or the preponderance of the testimony over the testimony of the defendants, your verdict will be for the defendants.

"The court instructs you that before you find for the plaintiff in any sum whatever, you must believe and find from the evidence that after plaintiff's cattle were delivered to the steamboat Stacker Lee, and before they were delivered by the master, servants or employees of said steamboat to the clerks, servants or employees of the Union Stockyards in the city of St. Louis, Missouri, said cattle of plaintiff were mixed up with or exchanged for other cattle of inferior grade, thereby causing plaintiff's lot or shipment of cattle to depreciate in value; and in this connection you are further instructed that if you believe and find that said Union Stockyards were, in January, 1907, and prior thereto, the usual and customary place for defendants' steamboats to deliver all shipments of live stock to the various

live stock buyers and commission merchants of live stock in the city of St. Louis, then the delivery of plaintiff's cattle to the stockyards was in law a delivery to plaintiff's consignee, Smith Bros. & Sparks, and your verdict and finding should be for the defendants.

"The court instructs you that if you believe and find from the evidence that the cattle of the plaintiff were kept separately penned up while in the custody of the defendants' servants, agents and employees, and without being mixed up or intermingled with other cattle, and were delivered to the clerk, servants or employees of the Union Stockyards in the city of St. Louis, Missouri, and that said Union Stockyards were, in January, 1907, and prior thereto, the usual and customary place used by the defendants' steamboats for discharging and unloading all of its shipments of live stock, then such delivery of plaintiff's cattle was in law a delivery to the consignee of said shipment, Smith Bros. & Sparks, and your verdict and finding should be for the defendants."

It is contended for defendant the evidence failed to show any of plaintiff's cattle were not delivered to the consignee at St. Louis, but we think otherwise. The testimony yields the impression that some of the cattle turned over to the consignees were never shipped by plaintiff, and would uphold that conclusion; for his were all steers and McNeily testified there were two or three cows among the lot delivered to him as plaintiff's. The evidence for plaintiff was directed to prove Oakley's cattle were substituted for his, but there was no direct proof this occurred, and if any animal which was not plaintiff's was delivered as his, it may have been some of the other cattle on the boat. This is immaterial, the questions being whether plaintiff's cattle were delivered, and if not, how many of them were omitted from delivery and the loss to him. His counsel insist defendants were responsible for the cattle in the stockyards and until they were turned over to McNeily

for Smith Bros. & Sparks, the morning after their arrival. They were receipted for, as we have seen, by Bender, who represented the consignees at the stock-yards, and taken charge of by him, and thereafter defendants were not responsible, for this was delivery to the consignees.

We have omitted to copy the first two instructions granted for plaintiff because they stated abstract propositions of law, and though probably correct, should not have been given, as they afforded the jury no aid. The third instruction, which is copied, *supra*, is unsound and confusing. For one thing it was so drawn as to make defendants responsible even though they were prevented from delivering the stock by the act of God or the public enemy, which is a good excuse for the failure of a carrier to deliver goods as per the bill of lading, and no doubt was intended to advise the jury as to the exception to defendants' liability; but as the instruction reads, they were made liable even if they failed to deliver them from one of those causes. This would be harmless error because defendants did not resist recovery on the theory the cattle had been lost from one of said causes, but contended they were delivered to the consignees. The instruction is otherwise inaccurate and misleading. It propounded no proper measure of damages, in case plaintiff was found entitled to recover. The jury were told to take into consideration in ascertaining the amount of damages sustained, the difference in the quality of plaintiff's cattle and those he received pay for according to their market value in the city of St. Louis, and the difference in the weight of the cattle. No evidence was introduced to show what plaintiff's cattle weighed. McNeily testified the lot turned over to him as plaintiff's weighed six thousand pounds, but as plaintiff was disputing those were his cattle, that testimony only went to prove the cattle received by McNeily were not plaintiff's because they weighed less than Oakley's, and the former's

cattle were shown to have been heavier than Oakley's. In the absence of some testimony that plaintiff's cattle weighed more than the lot delivered as his, the jury could not find they did and allow damages based on the difference in weight. Neither was the difference in the quality of the two lots to be considered in ascertaining the damages, but the difference between their market values. Expert witnesses testified plaintiff's cattle were worth \$3 to \$3.25 a hundredweight, and no doubt it can be proved what the cattle sold as plaintiff's brought per hundredweight. If it should be found other cattle were substituted for plaintiff's, then the measure of damages will be the difference per hundred or per head at destination in the value of the cattle shipped by plaintiff and those delivered as his, and plaintiff must produce evidence to enable a jury to find what this is.

The judgment is reversed and the cause remanded. All concur.

J. G. LAKENAN, Appellant, v. NORTH MISSOURI TRUST COMPANY, Respondent.

St. Louis Court of Appeals, February 21, 1910.

1. **PRINCIPAL AND SURETY: Duty of Creditor: Applying Proceeds of Property Mortgaged to Secure Debt.** Where the maker of a note gave a mortgage on cattle to secure the same and after selling the cattle turned the proceeds over to the creditor, if the latter knew the money turned over to him was the proceeds of the mortgaged property, he owed the duty to one who signed the note as surety to apply the whole amount toward paying the note, instead of turning a portion of it over to the maker, as the latter course would deprive the surety of his right in equity to subrogation.
2. ———: ———: **Preserving Liens.** A creditor must act in good faith and with reasonable diligence to preserve for the benefit of a surety liens held on the principal debtor's property.

Lakenan v. Trust Co.

3. ———: ———: May not Release Collateral Security. While a creditor is not bound, in the absence of a statute compelling action, to enforce a lien held on the principal's property, without discharging the surety, he may not release means in his hands to discharge the debt, and still hold the surety.
4. ———: ———: ———: Constructive Notice. When a creditor, who has released a lien on property of the principal, seeks nevertheless to hold the surety responsible on the ground the creditor released in ignorance of the surety's right to look to the lien for indemnity, the surety cannot be held if the creditor was apprised of such minor facts as would have induced a prudent man to inquire about the main facts, and inquiry would have ascertained the truth as to the surety's right to look to such lien for indemnity.
5. ———: ———: ———: Case Stated. Wilkins executed a note secured by a mortgage on cattle to a trust company and thereafter sold the cattle and deposited the proceeds in a bank to the credit and subject to the order of the trust company, the trust company being notified of such fact. The trust company drew a draft for the proceeds of the sale, which was duly paid, and immediately thereafter the trust company credited Wilkins with the amount thereof. Part of this amount was paid to Wilkins and the balance credited on said note. Wilkins was not a general customer of the trust company and had not been in the habit of making any deposits with it, except when he borrowed money from it. He made no request that the money be placed to his credit, but had it deposited to the trust company's credit. An account rendered to the trust company by the commission company covering the sale showed the sale was of the exact number of cattle covered by the mortgage, less one which had died. *Held*, that the officers of said trust company were apprised of facts which would have led men of common prudence to inquire whether the money represented the price of the mortgaged cattle and thus have elicited the truth, and that the trust company should have applied the entire proceeds of the sale as a credit on the note and thereby have protected a surety on the note.
6. ———: ———: ———: Sale of Property Mortgaged to Secure Debt: Knowledge of Surety. Neither the fact that a surety had knowledge that property mortgaged to secure the debt was sold nor that part of the proceeds of the sale was used to liquidate an indebtedness owing by the principal debtor to him would affect his right to hold the creditor responsible from paying the proceeds to the principal debtor, instead of devoting it toward payment of the debt.

Appeal from Audrain Circuit Court.—*Hon. James D. Barnett*, Judge.

REVERSED AND REMANDED (*with directions*).

Clarence A. Barnes for appellant.

(1) Plaintiff lost the value of \$1493.02 as security by the negligence or design of defendants North Missouri Trust Company and J. C. Mundy and as surety on the note involved in this suit is discharged to that extent from liability thereon. *Murrell v. Scott*, 51 Tex. 520; *Bank v. Bartle*, 114 Mo. 276; *Bank v. Kilpatrick*, 204 Mo. 119; *Taylor v. Jeter*, 23 Mo. 244; 1 *Brandt on Securityship and Guaranty* (3 Ed.), p. 934, sec. 498.

(2) If the creditor has the means of satisfaction from the property of the principal in his power and fails to avail himself of it, the surety is discharged. *Clom to use v. Coal Co.*, 98 Pa. St. Rep. 432; *Bank v. Thompson Grants Cas. (Pa.)*; *Dawson v. Bank*, 5 Ark. (5 Pike) 283; *Molka v. Ins. Co.*, 29 Pa. Super. Ct. 149; *Perrine v. Ins. Co.*, 22 Ala. 575; *Hurd v. Spencer*, 40 Vt. 410; *Kiam v. Cummings*, 13 Tex. Civ. App. 198; *Joyce on Defenses to Commercial Paper*, sec. 613, p. 768; *Phares v. Barbour*, 49 Ill. 370; *Kirkpatrick v. Hawk*, 80 Ill. 122; *Stewart v. Davis' Ex'r*, 18 Ind. 74; *Hayes v. Ward*, 4 Johns Ch. 123, 8 Am. Dec. 554; *Pierce v. Atwood*, 89 N. W. 669; *Lowe v. Reddan*, 100 N. W. 1038; *Frost v. Wilson*, 2 Am. Law J. 260, 2d Series, Vol. 9 Am. L. J.; *Ramsey v. Bank*, 2 Pen & Watts (Pa.) 203; *Richards v. Commonwealth*, 40 Pa. 146; *Gillespie v. Darwin*, 6 Heisk (Tenn.) 21.

Robertson & Robertson for respondents.

(1) Applying the rule in equity cases that the finding of the chancellor will be deferred to by the appellate court determines this case in favor of an affirmance of the judgment of the trial court. *Snell v.*

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Harrison, 83 Mo. 651; Sharpe v. McPike, 62 Mo. 300; Hodges v. Black, 76 Mo. 537; Royle v. Jones, 78 Mo. 403; Broughton v. Brand, 94 Mo. 160; Erskine v. Lowenstein, 82 Mo. 301; Hard v. Foster, 98 Mo. 297; Benne v. Schnecko, 100 Mo. 250; Roberts v. Stone, 99 Mo. App. 432; Mining Co. v. Mining Co., 106 Mo. App. 66. (2) The failure of the plaintiff, Lakenan, to take the witness stand when Wilkins had testified that Lakenan was familiar with his stock, knew of the shipment of these cattle and knowingly accepted a check for part of the proceeds from the sale of the cattle and after Mr. Pollock had testified that Mr. Lakenan gave the trust company the first information it had of the shipment of the cattle long after such shipment, must be treated as an admission on the part of the plaintiff of this evidence. He must therefore stand convicted of the knowledge that the security in the chattel mortgage was being gotten away from the trust company, and is now precluded from the complaint made in his petition. Wigmore on Evidence, sec. 289; Bank v. Levy, 106 La. 586; Baldwin v. Whitecomb, 71 Mo. 651; Goldsby v. Johnson, 82 Mo. 602; Werner v. Litzsinger, 45 Mo. App. 106; Ins. Co. v. Smith, 117 Mo. 261; Stephenson v. Kilpatrick, 166 Mo. 262. (3) The note was not due August 18th. Neither by the terms of the mortgage nor the note did it become due until default in the payment. The disposal of the property gave the mortgagee the right to take possession of it, but that disposal would not change the obligation it was given to secure. Even if the note had been due for any reason, the trust company was under no obligation so far as this plaintiff is concerned to apply Wilkins' deposit to the payment of the note. Bank v. Booze, 75 Mo. App. 189; Harburg v. Kumpf, 151 Mo. 16; Insurance Co. v. Landis, 50 Mo. App. 116; English v. Siebert, 49 Mo. App. 563; Barnes v. Mowery, 129 Ind. 568; Bank v. Peck, 127 Mass. 298; Bank v. Lilliard, 55 Mo. App. 675.

GOODE, J.—On July 2, 1904, defendant James H. Wilkins made and delivered to defendant James C. Mundy a promissory note for \$3928, due ninety days after date, drawing interest at the rate of eight per cent per annum, and signed by said Wilkins as principal and by plaintiff, Lakenan, as surety. The latter put the word "security" after his name to show the capacity in which he signed. James C. Mundy, the payee of the note, was at the time an officer of the North Missouri Trust Company, the trust company was the real party in interest in the transaction and Mundy at once transferred to it the note, which was executed to take up two earlier notes made by Wilkins to said company. One of the earlier notes was for \$3000 and secured like the one in suit by a chattel mortgage on sixty head of cattle belonging to Wilkins. The money obtained on the note for \$3000 was used, in the main, by Wilkins to buy cattle, and the money obtained on the earlier note for \$700 was used to buy feed for the cattle. The note in controversy was secured by a chattel mortgage on sixty-one head of cattle belonging to Wilkins. This mortgage, which was executed simultaneously with the note, stipulated that Lakenan should sign the note as security, the cattle should remain on the farm in Audrain county where they were and ready to be exhibited to the mortgagee on demand, they should remain in the possession of Wilkins until default was made in payment of the debt, and interest, or some part thereof, but in case of disposal or attempt to dispose of them, or removal of them, or attempt to remove them, from the county, the mortgagee might take possession and sell at public auction to the highest bidder for cash. On August 16, 1904, and six weeks before the note fell due, Wilkins shipped the cattle to the Bowles Live Stock Commission Company, at the Union Stockyards in Chicago, to be sold, and accompanied the shipment. They were sold by said Commission Company and realized net \$3446.02. Wilkins, in writing, directed the

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Bowles Commission Company to deposit this money, less \$25, which he drew in cash, to the credit of the North Missouri Trust Company and subject to its order, in the National Live Stock Bank of Chicago. Pursuant to Wilkins' order the commission company deposited the proceeds, less \$25, or \$3421.02, in said Chicago bank to the credit of the North Missouri Trust Company, and subject to its order. The direction given by the Bowles Commission Company to the National Live Stock Bank about the disposition of the money was in a writing purporting to be signed by Wilkins by the commission company as his agent, and said there was handed to the bank \$3421.02, to be placed to the credit of the North Missouri Trust Company, of Mexico, Missouri, subject to its order. The sale of the cattle in Chicago and the deposit of the proceeds to the trust company's credit, happened August 17th, and a letter was sent by the bank to the trust company on said day, notifying the latter of what had happened. This letter is not in the record nor are its precise contents shown. Mundy, the secretary of the trust company, testified he did not remember whether a letter of advice was received also from the Bowles Commission Company. The following document is in the record without any proof, further than appears on its face, that a copy of it was sent to the trust company. It was attached to the deposition of the secretary of the Bowles Commission Company, as a memorandum showing the sale of Wilkins' cattle, and as will be perceived at the bottom has the trust company's name and address, as though it was a report made to said company.

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"Chicago, August 17, 1904.

Sold for account of J. H. Wilkins; P. O. Mexico, Mo.; No. 1 shipped from Mexico, Mo.

Purchaser.	Cattle.	Price.	Amount.	
Armour	51 strs	5.20	3165.24	
Ulmer P. C.	9 strs	4.40	459.80	
U. P. C.	1 Dd chute		5.00	
				3630.04

Car No.	R. R.	Weight.	Rate.
28081		23500	18.5
2238		22300	"
3450		24000	"

Charges.

Freight, including terminal	135.12		
Yardage	15.25		
Hay	3.15	153.52	
Commission		30.50	184.02
Net Proceeds			3446.02
Cash			25.00
			3421.02

Anything not satisfactory please call for explanation.

North Missouri Trust Co.,
Mexico, Mo."

The witness said the document attached to his deposition was a copy of one rendered August 17th, without saying to whom it was rendered. After being advised this money had been put to its credit in the National Live Stock Bank at Chicago and was subject to its order, the North Missouri Trust Company drew a draft on said bank in favor of the Illinois Trust & Savings Bank, which was the Chicago Bank wherein the trust company kept an account. That draft was paid by the National Live Stock Bank at Chicago to the Illinois Trust & Savings Bank and was placed by the latter to the credit of the North Missouri Trust Company. Mundy testified that on August 18th, and before the trust company was opened for the day's business, he received the letter of the National Live Stock

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Bank stating the deposit had been made therein to the credit of the trust company, by order of Wilkins, and at once gave Wilkins credit on the books of the trust company for the amount, as he understood it was his money. Wilkins left for home on August 17th, on the 18th visited the trust company in Mexico, Missouri, and, as he says, asked Mundy if the company had had returns from the cattle and the latter said returns had been received. Wilkins then told him the money was the proceeds of the cattle on which the trust company held a mortgage; that he would like to borrow enough money from said company to pay off the note of \$3928, which was secured by the mortgage, and leave him about \$1500 over. The effect of Wilkins' testimony is that he asked this loan on the security of a chattel mortgage to be given on stock owned by him; that Mundy and Pollock, another officer of the trust company, talked the matter over and then said instead of making a new loan, they would mark the note in suit down to \$2000, would credit it with enough of the proceeds of the cattle to reduce it to \$2000, thereby leaving Wilkins the remainder of the proceeds, or about \$1500; also would extend the note as thus reduced. We should state that, according to the terms of the note, an extension could be granted without notice to Lakenan as surety, who would still remain bound. An indorsement on the back of the note shows it was marked on August 18th with a credit of \$1928, leaving a balance due of \$2000. Subsequently Wilkins paid \$84.89 interest, and on February 25, 1905, the note was extended for four months more. Mundy testified the officers of the trust company did not know the money put to their credit in the National Live Stock Bank in Chicago was the proceeds of the cattle on which they held a mortgage, and Wilkins did not tell them it was. As to this matter there is a conflict in the evidence. Mundy said he and Pollock thought as the Wilkins note to the trust company did not mature until October, the money was the

proceeds of other cattle shipped by Wilkins, who was entitled to dispose of it as he pleased; that he made no inquiry of Wilkins about the matter, as stock shippers who did business with the trust company were accustomed when they sold stock in city markets, to have the proceeds put to the company's credit in some bank where the sale occurred, and the company would give the shipper credit on its books for the amount as soon as it was advised of the deposit to its credit in the city bank. Munday testified Wilkins said nothing of the money in question being the proceeds of the mortgaged cattle, or of wishing to borrow to pay off his note; but only said he wanted to pay the note down to \$2000, which he did by drawing a check against his deposit account; that he checked out the balance of the account later. Subsequently the trust company made a demand on Lakenan, as security, for the balance, and he refused to pay it; Pollock says, on the ground he had been released by the extension of the note, though he mentioned, too, the shipment and sale of the cattle and said he thought the trust company was aware of those facts at the time. The present action is in the nature of a bill in equity filed by Lakenan, alleging, among other things, the shipment and sale of the cattle by Wilkins, without Lakenan's knowledge, and the omission of the trust company, with full knowledge of the facts, to apply the entire proceeds toward satisfaction of the note on which Lakenan was security; alleging further the trust company only credited the note with \$1928 and the remainder, or \$1492.02, was negligently and willfully lent to Wilkins, who was at the time and still is, insolvent. Plaintiff tendered \$493, which would be the balance due on the note if the entire proceeds of the cattle had been applied toward paying it, and prayed the note be cancelled and surrendered to him. The answer of Mundy and the trust company, after admitting various statements of the petition, and setting out the provisions of the chattel mortgage, alleged there was no

agreement, express or otherwise, with plaintiff that he was to be liable as security on the note or only to the extent the cattle should fail to pay it, if Wilkins did not pay it; denied the trust company accepted plaintiff as additional security and alleged it accepted him according to the terms of the note as one of the principals and responsible for the whole amount; then alleged the trust company had no knowledge or information at the time it disposed of the proceeds of the cattle as has been stated, that said proceeds had arisen from the sale of cattle mortgaged to the trust company, and in truth never learned this until plaintiff told it long afterwards. In connection with the answer a counterclaim was set up for the balance of \$2000 alleged by the trust company to be due on the note, with interest from February 25, 1905. The answer of Wilkins was a general denial of the averments of the petition. A replication was filed by plaintiff setting out various matters which need not be recited, as they are but repetitions of what has already been stated. The replication, like the original petition, averred plaintiff signed the note as additional security, for the accommodation of Wilkins, and charged that on August 18, 1904, Wilkins paid to the trust company on said note the sum of \$3421.02, or the full amount realized by selling the cattle. Evidence was given tending to prove Wilkins was insolvent at the dates in question; that Lakenan saw him driving the cattle through the city of Mexico for shipment and talked with him, but the evidence was not direct that Lakenan knew the cattle were those mortgaged to the trust company. The proof showed Wilkins commonly did business with the Mexico Savings Bank and not with the trust company, and though his account with the latter was introduced to prove the contrary, it did not extend back of December, 1903, the date of the original \$3000 loan to him. Proof was made that Wilkins drew two or three checks on his account in the trust company in favor of Lakenan to

pay rent and others items, after the proceeds of the cattle had been credited to Wilkins.

The court found the issues for the trust company and dismissed plaintiff's bill; further finding the issues on the counterclaim in favor of the trust company and entering judgment against plaintiff on the counterclaim for \$2303.39. After appropriate motions, plaintiff appealed.

If the trust company knew the money which Wilkins had caused to be put into its hands was the proceeds of the very cattle on which it held the mortgage, then Lakenan's right to be released from payment of so much of the note as would have been satisfied by applying the entire proceeds toward its satisfaction, is not gainsaid. Though something is said in the answer about Lakenan having signed the note as principal, this averment was refuted by both the note itself and the mortgage, which showed he signed as surety, and the contention to the contrary has not been insisted on by counsel for the trust company. Their position on the appeal is that the trust company did not know the money deposited to its credit and subject to its order, in the National Live Stock Bank of Chicago, pursuant to the order given by Wilkins to the Bowles Commission Company, had been obtained by selling the cattle embraced in the mortgage to the trust company. If the trust company knew the facts, then inasmuch as it had in its hands the proceeds of the mortgaged property, which Wilkins had had deposited to the company's credit because of its lien on the cattle, the company owed the duty to Lakenan to apply the whole amount toward paying the note, instead of turning over a portion of it to Wilkins, as the latter course would deprive Lakenan of his right in equity to proceed by way of subrogation to enforce the mortgage in case he was compelled to pay the debt. A creditor must act in good faith and with reasonable diligence to preserve for the

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benefit of a surety, liens held on the principal debtor's property. [1 Brandt, Suretyship (3 Ed.), sec. 500; 27 Ency. Law (2 Ed.), pp. 576 *et seq*; Ferguson v. Turner, 7 Mo. 497; Rice v. Morton, 19 Mo. 263, 280; State Bank v. Bartle, 114 Mo. 276; Plankinton v. Gorman, 93 Wis. 250; City Bank v. Young, 43 N. H. 457.] The creditor may not be bound, in order to protect a surety, to proceed against a collateral security given by the principal, and if it happens a bank is the creditor, it may not be bound to apply a general deposit belonging to the principal debtor in payment of his debt. [Citizens Bank v. Booze, 75 Mo. 189.] But the creditor's privilege to remain passive (in the absence of some statute compelling action, like ours compelling him to sue on demand of the surety), as regards enforcing a lien held on the principal's property, without discharging the surety, does not extend so far as to allow the creditor to release means in his hands to discharge the debt, for instance, a mortgage lien, and still hold the surety. The case of Rice v. Morton, *supra*, was sufficiently like this one in its facts and results to make it a positive precedent for plaintiff, and in it the court examined and considered the effect of many decisions. If the trust company's officers, without knowledge of the source from which the money came, or of facts sufficient to put a person of ordinary prudence on inquiry, placed fifteen hundred dollars, or thereabouts, of the proceeds of the mortgaged cattle subject to Wilkins' check, and he checked same out, it was guilty of no breach of the duty it owed to Lakenan to use good faith and care to protect his equity of subrogation; otherwise it was in fault and Lakenan must stand discharged from a proportionate liability on the note. We are pressed to defer to the opinion of the court below on the issue of the knowledge of those officers, as the evidence is contradictory; but though there is a conflict as to what passed between Wilkins and the two officers of the

trust company when the former returned from Chicago, the facts apart from this conversation are not in dispute. If Wilkins' testimony is accepted, Mundy was told the money the company had received by Wilkins' order had been raised by selling the mortgaged cattle. It was natural for Wilkins to tell him how the money was obtained, especially as Wilkins asked, he says, to use all of it toward paying the mortgage debt, and Mundy says he asked to use part of it for that purpose. But Mundy denied Wilkins mentioned what cattle had been sold, and denied further inquiring about the matter. Granting this is true, we think Mundy was in possession of facts which should have led him to ask if the money represented the mortgaged cattle, before allowing Wilkins to dispose of it at his pleasure. Though Mundy said it was customary for stock men who were patrons of the company, to deposit the proceeds of sales of stock to the company's credit in some bank where they marketed cattle, and customary for the company on receiving advice of the fact, to place the amount to the credit of the patron, there is nothing to prove such a transaction had occurred before in dealings between the company and Wilkins. The dealings between those parties, as Wilkins' account on the books of the bank shows, dated from December 12, 1903, when the original loan of three thousand dollars was made to him, and the items of the account relate to the disposition of that loan and the loan of seven hundred dollars, both of which were merged in the note in suit. The items consisted of checks drawn by Wilkins against the funds thus procured, and against the proceeds of the mortgaged cattle. If there were any other transactions, they were of a trivial nature. Mundy said he knew the money deposited to the company's credit in the Chicago bank was the proceeds of stock Wilkins had shipped to Chicago and sold. He had been informed by the National Live Stock Bank the money for cattle sold by Wilkins had been deposited to the credit of the trust

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company, and subject to its order; an unusual and noticeable act, as Wilkins was no general customer of the trust company and in the habit of making large deposits in it, or, indeed, any deposits except when he borrowed money from it. Besides, he made no request for the money to be placed to his credit, but had it deposited to the company's credit and subject to its order. Mundy did not deny or admit the Bowles Commission Company had written regarding what had been done with the proceeds of the sale of Wilkins' cattle, and it is to be inferred from the testimony of the secretary of the commission company and from the name of the trust company appearing on the account of sales shown supra, that said account had been rendered to the trust company. The account showed on its face the sale was of the exact number of cattle covered by the trust company's mortgage, less one which had died; and, moreover, there was no reason for rendering the statement, except the trust company's lien on the cattle. The officers of said company were put in possession of these facts on August 17th, and were aware of them on August 18th, when Wilkins visited the company and asked Mundy if any credit had been received for cattle sold by him. With such knowledge in the minds of the officers, it is perfectly clear to us they were apprised of facts which would have led a man of common prudence to inquire whether the money represented the price of the mortgaged cattle, and clear also that a single question to Wilkins would have elicited the truth, and, if the company used the proceeds properly, would have resulted in protecting Lakenan. Such being the circumstances, the point for decision is whether the officers, in order to perform their obligation to exercise ordinary diligence to preserve the mortgage lien for indemnity to Lakenan, were bound to inquire regarding the source of the money Wilkins had put in their hands, accompanied with information that it was the proceeds of a sale of stock, before they turned part of it over to

him; for if this was their duty, the trust company is chargeable with notice of the facts, and cannot compel Lakenan to pay so much of the note as would have been satisfied by applying the whole sum as a payment on it. [Stern, etc., Co. v. Mason, 16 Mo. App. 473.] The rule that a person shall be treated as though he acted with knowledge of a material fact, if he was apprised of such minor facts as would have induced a prudent man to inquire about the main fact and inquiry would have ascertained the truth, was developed in chancery courts, but is now adopted in many actions at law. So was the rule which discharges a surety from liability when the creditor releases liens on the property of the principal debtor, though it, too, now pervades the rules of law governing the rights of creditors and sureties. [Mackintosh v. Wyatt, 3 Hare. 567; 27 Ency. Law (2 Ed.), 489.] It follows that when a creditor who has released a lien on property of the principal, seeks nevertheless to hold the surety responsible on the ground the creditor released in ignorance of the surety's right to look to the lien for indemnity, the above mentioned rule of the law of notice ought to be applied, though we have found no case where the question of its application under those circumstances was determined. This rule has been applied under diverse circumstances in order to enforce equitable titles or rights; perhaps most frequently where a person had acquired the legal title to property or a lien on it, with knowledge of facts which ought to have caused inquiry as to the existence of an unrecorded equitable right or title. [Rhodes v. Outcalt, 48 Mo. 367; Drey v. Doyle, 99 Mo. 459, 12 S. W. 287.] It is applied, too, where one buys or takes a lien upon the property of an insolvent debtor, whose intention is to hinder and defraud his creditors, and facts are known to the later purchaser or incumbrancer which, if followed by an investigation, would have exposed the purpose of the debtor. [Rupe v. Alcair, 77 Mo. 641; Roan v. Winn,

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93 Mo. 503; 4 S. W. 736.] Upon the same principle a bank has been charged with notice that funds deposited to the credit of an individual really belonged to some one else, when the circumstances suggested the truth and it would have been discovered by due diligence. [Eyerman v. Bank, 13 Mo. App. 289, 84 Mo. 408.] A lender had taken a mortgage on some mining property, and during the negotiation for the mortgage, had learned the borrower did not as yet own the property but expected to buy it from a mining company, paying part of the purchase money and executing a mortgage on the property for the remainder. As the lender took his mortgage knowing of the pending sale from the mining company, it was held he ought to have inquired about the terms of the sale, and was affected with knowledge of them and, among others, of the agreement to give the mining company a mortgage for part of the purchase money. Hence said mortgage was awarded priority to the plaintiff's, though, in point of fact, it was not recorded until later. [Montgomery v. Keppel, 75 Calif. 128, 78 Am. St. Rep. 125.] The right of the mining company to priority was adjudged because the lender might have ascertained the existence of the equity by pursuing the facts he knew. In the cited case the ultimate fact of which notice was to be imputed was the existence of an outstanding equity in certain property; here the ultimate fact was not the existence of an equity in favor of Lakenan, but whether that equity related to a particular property, to-wit, the money Wilkins had put in the trust company's hands. Said company knew, or must be presumed to have known, Lakenan had the right to have the proceeds of the mortgaged cattle, if said proceeds passed into the company's hands, applied on the mortgage debt. Hence there is no occasion for the application of the doctrine of notice to that right; but the question is rather whether the trust company was bound, considering the facts it knew, to ask if the money Wilkins had

put to its credit as the price of a shipment of stock, had accrued from a sale of the stock to which Lakenan might have recourse if he was compelled to pay Wilkins' note. There seems to be no sound reason why the trust company's officers were not as much bound to take this precaution, as they would have been to inquire concerning the real owner of money deposited with it, if the circumstances suggested the depositor was not the true owner. We do not say removing the cattle to Illinois and selling them without the mortgagee's consent, defeated the latter's lien or that the purchaser could hold the cattle against it. [2 Cobby, Chat. Mort., sec. 588; Jones, Chat. Mort. (5 Ed.), sec. 260a.] What we decide is that if the trust company either ratified the sale by knowingly accepting the proceeds and turning part of them over to Wilkins, or turned part over to the latter when by due care it could have learned the facts, it committed a breach of duty which materially altered the situation as to Lakenan and rendered it so difficult or impossible for him to enforce his right of subrogation, that he ought to stand discharged *pro tanto*. The rule is stated broadly enough in one treatise to embrace the case at bar:

"Where such facts or circumstances are known to a person in relation to a matter in which he is interested as are sufficient to make it his duty as an honest and prudent man to inquire concerning the rights of other persons in the same matter, and the course of inquiry thus suggested would, if followed with due diligence, lead to a discovery of rights in conflict with his own, the general rule is that he will be held chargeable with notice of all that he might thus have discovered, and will not be heard to say that he did not actually know of the fact or claim in question." [21 Ency. Law (2 Ed.), 584.]

We do not see how Lakenan's knowledge that the cattle had been shipped, or the payment to him by Wilkins of debts the latter owed out of money the com-

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pany had already put to Wilkins' credit, can affect the former's right to hold the company responsible for not devoting the money toward payment of the note.

The judgment is reversed and the cause remanded with a direction to treat the note as credited in favor of Lakenan, the security, on August 18, 1904, with the sum of \$3421.02, and enter judgment against him for the balance due, after taking account of other payments; the costs to be taxed against defendants. All concur.

SUSAN JEUDE et al., Appellants, v. THOMAS B. SIMS et al., Respondents.

St. Louis Court of Appeals, February 21, 1910.

JURISDICTION: Appellate Jurisdiction: Suit to Quiet Title: Appeal from Order Setting Aside Judgment. A case to quiet the title to land falls within the clause of the Constitution which withholds jurisdiction from the Court of Appeals of causes involving the title to real estate, and the Court of Appeals has no jurisdiction of an appeal from an order setting aside a final judgment in such a cause; the Supreme Court alone having jurisdiction thereof.

Appeal from Ste. Genevieve Circuit Court.—*Hon. Chas. A. Killian*, Judge.

TRANSFERRED TO SUPREME COURT.

Jere S. Gosson and *W. O. Anderson* for appellants.

Ely & Kelso and *John A. Hope* for respondent.

GOODE, J.—This case is statutory and was instituted to quiet the title to a certain tract of land on averments plaintiffs are the owners in fee, the land is

not in the possession of any person, it is wild and uncultivated, and defendants claim title to it and an estate in it adverse to plaintiffs; wherefore the court was prayed to ascertain and determine the estate, title and interest of plaintiffs and defendants respectively, and define and adjudge the same by decree. In answer a general denial was filed. The case was set for hearing on July 23, 1906, at the April term of the Ste. Genevieve Circuit Court, to which a change of venue had been granted. On said day defendants made application for a continuance to the next day, July 24th, setting up an agreement between George H. Williams, the main attorney for defendants and the plaintiffs, or two of them, for a continuance of the case to the next regular term of the court. The application for continuance showed this agreement had been made some time prior to the date of the trial, and in reliance on it Judge Williams had not attended the Ste. Genevieve court on the day the case was set for trial, and had notified the other counsel for defendants of the agreement and that pursuant to it the case would be continued. The application further showed the other attorneys of defendants who were present in the Ste. Genevieve Circuit Court on July 23d, had none of the papers or muniments of title showing the title to the land in controversy was in defendants, but all such papers were in the possession of Judge Williams, or one of the defendants, Thomas B. Sims, who, the application said, was ill and unable to attend the court. It was further shown Judge Williams, the main counsel for defendants, could be present with their muniments of title on the next day, July 24th. Formal averments of diligence and that the application was not made for vexation and delay were set forth. This application was overruled; whereupon the attorneys for defendants, who were present, withdrew from the case and refused to take part in the proceedings, and judgment was entered for plaintiff upon evidence submitted by them. This judgment

found plaintiffs were the owners in fee of the land described in the petition, with a dower interest in plaintiff Susan Jeude, the widow of Casper Jeude, and each of the other plaintiffs owned an undivided one-fifth interest in the fee, subject to said dower; that defendants had no right, title or interest in the land, and it was considered and adjudged that the absolute legal and equitable title to it was in plaintiffs, and defendants and those claiming under them, should be precluded and barred from ever setting up any right, title or estate in or to the premises. On the day the judgment was rendered the court adjourned to court in course, which was the October term, 1906. Nothing was done in the case during the latter term, but in vacation, and on February 19, 1907, the defendants filed a motion or petition in the clerk's office to have the judgment entered on July 23d, 1906, set aside as irregular and as having been prematurely rendered. The real grounds of the petition were the agreement aforesaid between Judge Williams as counsel for defendants and two of the plaintiffs, that the cause should not be heard on July 23, 1906, or during said term of the court, but should be continued to the next term, the violation of this agreement by plaintiffs in refusing to continue the cause and their taking advantage of it in the absence of defendants and their main attorney, to obtain a judgment in their favor. It was alleged in the petition to vacate the judgment, that it was not only irregular, but had been fraudulently obtained against defendants. After hearing evidence on this petition, the court sustained it during the April term, 1907, to-wit, on April 30th. The order sustaining the petition to vacate the judgment concluded by saying it was ordered and adjudged by the court the judgment theretofore rendered in the cause be set aside and vacated, and the defendants have and recover of plaintiffs the costs in this behalf expended. Motions for new trial and in arrest were filed by plaintiffs and overruled and an appeal was

taken to this court from the order vacating the original judgment rendered in favor of plaintiffs.

We have given attention to the merits of the appeal and are prepared to decide it, but though the question has not been presented, we are satisfied the proceeding is one which lies beyond the scope of our jurisdiction. A case to quiet the title to land is held to fall within the clause of the Constitution which withholds jurisdiction from this court of causes involving the title to real estate. [Northcutt v. Eager, 132 Mo. 265, 33 S. W. 1125.] We do not perceive how we can have jurisdiction of an appeal from an order setting aside a final judgment which has been entered in such a cause, whereby the title to the land in controversy was adjudicated, any more than we would have jurisdiction to hear an appeal taken from said judgment. If we should hold the court rightly vacated the judgment, the title would remain open for future determination; that is, the case would have to be retried; but if we should hold the court wrongly vacated the judgment, we would have to reverse the ruling, leaving intact a judgment which found plaintiffs owned the land and precluded defendants, or any person claiming under them, from ever asserting title thereto. We think the appellate jurisdiction of the cause is in the Supreme Court, to which it is ordered transferred. All concur.

Bick v. Dixon.

J. J. BICK, Appellant, v. CHARLES H. DIXON,
Respondent.

St. Louis Court of Appeals, February 21, 1910.

1. **JUDGMENTS: Scire Facias: Not "Action."** A proceeding by *scire facias* is not, strictly speaking, an action, but a mere continuation of and ancillary to the original action.
2. **APPELLATE PRACTICE: Presumptions: Regularity of Proceedings in Trial Court.** The court on appeal will indulge the presumption of regularity of the proceedings of the trial court and that the party complaining has put in all his probative facts.
3. **JUDGMENTS: Scire Facias: Suit for New Judgment Pending: Abatement.** Pending an appeal from a judgment on the merits for defendant in an action brought on an original judgment, *scire facias* to revive the original judgment will not lie.

Appeal from Monroe Circuit Court.—*Hon. David H. Eby*, Judge.

AFFIRMED.

Peter T. Barrett and *Abe Lowenhaupt* of counsel;
J. J. Bick, appellant, *pro se*.

(1) A transcript of this judgment was filed in the circuit court and thereby becomes for many purposes the same as a judgment of that court. *Carpenter v. King*, 42 Mo. 219; *Gordon v. Surghnor*, 107 Mo. 520. (a) A judgment upon a judgment does not merge the original judgment. 23 Cyc., 1474. (2) A suit upon a judgment and a proceeding to revive the same by *scire facias* are cumulative remedies, and the plaintiff can pursue both at the same time. 23 Cyc., 1448 b; *Carter v. Coleman*, 12 Ired. L. (N. Car.) 274; *Haupt v. Burton*, 21 Mont. 572; 18 Am. and Eng. Ency. Proc. and Prac., pp. 1057, 1088; 23 Cyc., p. 1474; *Lafayette County v. Wonderly*, 92 Fed. 313; *Wonderly v. Lafayette County*, 150 Mo. 635; 2 Coke's Inst. 472; *Goddard*

v. Delaney, 181 Mo. 564; Long v. Thormond, 83 Mo. App. 227. (3) A plea of prior adjudication must show a final judgment on the cause of action. A judgment appealed from is not a final judgment. Ketchum v. Thatcher, 12 Mo. App. 185; Young v. Thrasher, 61 Mo. App. 413.

J. H. Whitecotton for respondent.

STATEMENT.—*Scire facias* to revive a judgment obtained before a justice of the peace of Monroe county, in which judgment J. J. Bick, the present plaintiff and appellant, was plaintiff, and Charles H. Dixon, the present respondent, was defendant, a transcript of the judgment having been filed in the office of the clerk of the circuit court of Monroe county. At the return term of the writ defendant filed a motion to quash “because there is now pending on appeal from this court to and in the St. Louis Court of Appeals, an appeal from the judgment of this court by the plaintiff from a judgment of this court on the same judgment upon which this said writ is issued.” The motion coming on to be heard it was submitted on the following stipulation, there being no evidence offered outside of the stipulation: “That this suit is a suit instituted by *scire facias* to revive a judgment on which judgment a suit for a new judgment had been brought in this court and on the trial of the merits of (same) judgment was entered in favor of defendant; and plaintiff in that case, the plaintiff in this case, duly appealed from the judgment of this court on the judgment entered in said cause and that said appeal is now pending in the St. Louis Court of Appeals.” The trial court sustained the motion to quash the writ, plaintiff excepting, and after an unsuccessful motion for new trial the case is here on appeal.

REYNOLDS, P. J. (after stating the facts).—While counsel speak of this as “an action,” a proceeding

by *scire facias* is not, strictly speaking, an action, but a mere continuation of and ancillary to the original action. [Sutton v. Cole, 155 Mo. 206, 55 S. W. 1052; Bick v. Tanzey, 181 Mo. 515, 80 S. W. 902.]

Judge GANTT, speaking for our Supreme Court, in Rodney v. Gibbs, 184 Mo. 1, l. c. 11, 82 S. W. 187, and discussing the effect of an appeal, says: "Until reversed or set aside, that decree was valid and binding, and although an appeal was then pending in this court, as it was taken without bond being given, it did not even suspend the judgment nor prevent the enforcement of the decree by execution." Further along and referring to the decision of Judge THAYER, in Ransom v. City of Pierre, 41 C. C. A. 585, in which Judge THAYER reached the conclusion that the weight of authority as well as reason is, that when a case is removed to an appellate court by a writ of error or an appeal, and it is not to be tried there *de novo*, but is to be determined by an examination of the record and the judgment either reversed or affirmed or modified, that such an appeal or writ of error does not vacate the judgment below nor prevent it from being pleaded or given in evidence as an estoppel upon issues that were tried and determined, unless some local statute provides that it shall not be so used pending the appeal. It is said by Judge GANTT (l. c. 14): "The question is not without its difficulties, from whatever standpoint we view it, but we are of opinion that under our laws, the judgment is a determination of the rights of the parties thereto until reversed or modified, and, indeed the great weight of authority is, that a supersedeas has no other force or effect than to prevent the enforcement of the judgment and does not destroy its operation as a former adjudication. In this case," says Judge GANTT, "we have no supersedeas, but a mere naked appeal, and hence under either doctrine the judgment . . . was an estoppel to reopening the issues found against defendants in this case who were plaintiffs in that, and the pendency of the

appeal did not destroy the effect of that decree as an estoppel, and it follows the circuit court erred against the plaintiff in not according it that effect." It is claimed by the learned counsel for the appellant, that all that is said in this case of *Rodney v. Gibbs*, upon the effect of an appeal with supersedeas bond to prevent the judgment appealed from operating as *res judicata* is obiter and was not in decision in that case. While in the case before us there is not a question of *res judicata*, strictly speaking, the application of the decision in *Rodney v. Gibbs* to the case at bar is this: It determines that notwithstanding a judgment has been appealed from, it is in full force and effect pending the appeal, even with a supersedeas bond, the only effect of the supersedeas bond being to stay its enforcement; and further applying it to the case before us, its effect is to hold that the judgment on which this *scire facias* was sued out having been vacated by a judgment rendered in a direct suit upon it, the first judgment is of no force and effect, and although the latter judgment has been appealed from, no *scire facias* could issue on the first or original judgment, pending the appeal. As we understand the facts in this case, the *scire facias* here under consideration was sued out after the rendition of the judgment annulling the original judgment. Therefore the point urged by counsel, that a suit on the judgment and a *scire facias* to revive the judgment can be maintained simultaneously, is of no importance in this case, because if there was no valid, subsisting, enforceable judgment in existence, neither a *scire facias* nor an action would lie. Either proceeding can stand, only when there is an enforceable judgment to act upon. If it is meant by contention of counsel, that the only point in decision in *Rodney v. Gibbs* is that a judgment appealed from without a supersedeas bond is so much a judgment and enforceable as to sustain a plea of *res judicata*, but that what is said about not enforcing or pleading a judgment when a supersedeas bond has been given, is obiter, then

we are without anything in the case at bar to show which of these was the fact here. The stipulation upon which the case was tried and which is the only matter in the record before us showing what was before the trial court, is silent on this point. It was for the plaintiff to have cleared that up; for if no supersedeas issued, the case confessedly was within the Rodney decision; to bring it within what appellant calls the obiter and so without the real decision, appellant should have shown the execution of a supersedeas bond. If we are to indulge in presumptions, however, as to this, they must always be, first, in favor of the regularity of the proceeding of the trial court, and, second, that the party has put in all his probative facts. We have a right to presume that if a supersedeas bond had been given, the fact of its being given was such a material fact for appellant, that he would not have omitted it from the stipulation upon which the case was tried. But in the light of the decision in *Rodney v. Gibbs*, we hold that it was unimportant whether a supersedeas bond had been given or not. As we understand that decision, it holds that the appeal itself, whether with or without a supersedeas bond, did not operate to reinstate the judgment vacated by the judgment appealed from. In the case at bar, in suing out the *scire facias*, appellant attempted to entirely ignore the fact that the judgment of the court on which he sued out the *scire facias* had before then been set aside and vacated. It is admitted that that judgment had been annulled when the writ of *scire facias* was sued out and issued. True, that judgment, vacating the original one, was appealed from. That appeal was pending and undetermined, but certainly the appeal did not reinstate the judgment vacated by the judgment appealed from. That being so, there was nothing for this writ to act upon. On the authority of the Rodney Case, the judgment in the case before us is affirmed. All concur.

**J. J. BICK, Appellant, v. CLARA UMSTADTT et al.,
Respondents.**

St. Louis Court of Appeals, February 21, 1910.

JUDGMENTS: Bick v. Dixon Followed. The facts being the same as in Bick v. Dixon, *ante*, that case is followed.

Appeal from Monroe Circuit Court.—Hon. David H. Eby, Judge.

AFFIRMED.

*Peter T. Barrett and Abe Lowenhaupt, of counsel;
J. J. Bick, appellant, pro se.*

J. H. Whitecotton for respondent.

REYNOLDS, P. J.—The facts in this case, so far as relate to the issue of *scire facias* on a judgment in a case between the parties in this case and an appeal pending on it, and the motion to quash heard on stipulation, all being, save as to parties, as in the case of Bick v. Dixon, on the authority of the decision in that case, the judgment in this case is affirmed. All concur.

ROBERT JOHNSON, Admr., Respondent, v. JACOB STEPHENS, Appellant.

St. Louis Court of Appeals, February 21, 1910.

APPELLATE PRACTICE: Judgment Sustained by Evidence.

Where there is ample evidence to sustain a finding of fact made by the trial court, the judgment rendered thereon will not be disturbed on appeal.

Appeal from Clark Circuit Court.—*Hon. Chas. D. Stewart*, Judge.

AFFIRMED.

G. M. Callihan and *O. S. Callihan* for appellant.

S. L. and *L. J. Montgomery* for respondent.

REYNOLDS, P. J.—This action was commenced before a justice of the peace on a statement filed before him. The case was taken on appeal to the circuit court on judgment in favor of plaintiff and a like result following in that court, it was appealed to this court and is reported 107 Mo. App. 629, 82 S. W. 192, where such a full statement of it is made that it is unnecessary to repeat what will be found on reference to that report. On the former hearing of the case in this court, Judge **BLAND**, after stating the facts in the case and the evidence in it, and that the facts show that Johnson, the complainant, was entitled to call on defendant to account for the proceeds of the sale of the property, and if there was a surplus after deducting what would reimburse him, to require defendant to pay over that surplus to him, says "though the complaint states a cause of action at law, the instruction given for plaintiff (which he quotes) submitted to the jury purely equitable is—

sues and was based upon plaintiff's evidence." The cause was accordingly remanded. Pending the trial plaintiff and defendant died and this present action is between their respective legal representatives. On the trial anew, the evidence taken in the former trial as preserved by the bill of exceptions, was all the evidence adduced in this last trial. A jury was waived, the case tried by the court, properly tried as an action at law, and the court correctly declared the issues, basing plaintiff's right to recover as in an action at law and found for plaintiff in the sum of \$89.78 and judgment followed accordingly. We find no error in the instructions or the admission or exclusion of testimony. There was ample evidence in the case to sustain the finding of fact which the trial court made and we see no reason to disturb the judgment. It is accordingly affirmed. All concur.

**C. E. MOOTS, Appellant, v. QUINCY COPE, Admr. of
the Estate of MISSOURI SUMMERS, Deceased,
Respondent.**

St. Louis Court of Appeals, February 21, 1910.

- 1. STATUTE OF FRAUDS: Principal and Agent: Contract to Sell Real Estate: Variance from Terms.** Under section 3418, Revised Statutes 1899, providing that no contract for the sale of lands made by an agent shall be binding on the principal unless the agent is authorized in writing to make the contract, the variance between a contract authorizing an agent to sell land for one-half cash, the balance in one year with six per cent. interest from date, and a contract of sale made by the agent, which stipulates for the payment of \$200 down, \$1800 at a certain date, and the balance in two years at five per cent. interest, running from a future date, is substantial, and the contract is not binding on the owner in the absence of a ratification in writing.

2. ———: ———: ———: Evidence: Verbal Acquiescence. In order to bind the principal by the contract of his agent for the sale of real estate, it must be shown the authority given the latter was in writing and authorized him to make the contract sought to be enforced, and the authorization of the agent to make a certain contract cannot be varied by a subsequent parole agreement. Evidence to show verbal acquiescence in an altered contract on the part of the owner would be, in effect, an attempt to vary by parole the contract the owner had authorized the agent to make, and hence would be inadmissible, under section 3418, Revised Statutes 1899.
3. **CONTRACTS: Pleading: Legal Implication.** When the law requires a contract to be made in a particular manner, an allegation that it is made implies that it is made in lawful form.
4. **REAL ESTATE AGENTS: Pleading: Amended Reply: Departure.** In an action for damages for breach of a contract for the sale of real estate, made by an agent, where the petition counted on a written contract made for defendant by her agent, the court properly refused to allow an amended reply to be filed, after all the evidence was in, which averred that defendant had ratified the contract of sale after it had been made by her agent, for the reason it practically presented a new issue from that made by the petition.
5. ———: ———: ———: ———: Not Warranted by the Evidence. In such a case, leave to file an amended reply, pleading ratification, after all the evidence was in, to make the pleadings conform to the proof, was properly denied, as not being warranted by the evidence, since ratification of such a contract must be in writing and plaintiff's counsel admitted there had been no such ratification.
6. **ESTOPPEL: Pleading: Necessity of Pleading Estoppel.** An estoppel to be available must be pleaded.

Appeal from Montgomery Circuit Court.—*Hon. R. S. Ryors*, Special Judge.

AFFIRMED.

Thos. W. Tipton and E. Rosenberger & Son for appellant.

(1) (a) Where a principal puts an agent forward as a general agent, though in a particular line, or places

him in a position where others are justified in the belief that his powers are general, the restrictions that may be imposed upon him privately will be immaterial except as between him and his principal. *Woolen Mills v. Meyers and Cole*, 30 Mo. App. 124; *Manufacturing Co. v. Ball*, 43 Mo. App. 504; *Samuels v. Bartree*, 53 Mo. App. 587; *May v. Trust Co.*, 138 Mo. 385. (b) If the principal leads third persons, acting reasonably and in good faith, to believe that his agent possesses a certain authority, then as to them, he does possess it. *Mecham's Agency*, sec. 707 *et seq*; *Sumerville v. Railroad*, 62 Mo. 391; *Johnson v. Hurley*, 115 Mo. 513; *Hackett v. Van-Frantz*, 105 Mo. App. 385. (c) A party dealing with an agent has a right to rely in good faith upon the apparent authority of the agent, and it is not material whether the agent is general or special. *Mechem on Agencies*, sec. 284; *McNichols v. Nelson*, 45 Mo. App. 446; *Keller v. Meyer*, 74 Mo. App. 318. (2) (a) Where a sale is not made in strict conformity to the original contract, and although it is more advantageous, still it will not bind the principal. But where the principal ratified and approved of the agent's conduct, the ratification and approval is equivalent to a prior authority. *Nesbitt v. Helser*, 49 Mo. 383; *Gelatt v. Ridge*, 117 Mo. 561. (b) Plaintiff's proffered reply setting up a ratification was not a departure nor an amendment, and the court erred in not permitting plaintiff to amend his reply. *McLachlin v. Barker*, 6 Mo. App. 511.

S. S. Nowlin and P. H. Cullen for respondent.

(1) Since the passage of the amendatory act it has uniformly been held that it is necessary to show that the agent had written authority "to make the contract which he does make." *Johnson v. Fecht*, 185 Mo. 343; *Hawkins v. McGroarty*, 110 Mo. 546; *Roth v. Georger*, 118 Mo. 556; *Fox v. Courtney*, 111 Mo. 147; *Greening v. Steele*, 122 Mo. 287. Under sec. 3418, R. S. 1899, the

written authority of an agent to sell land for the principal must be strictly construed and scrupulously followed. *Johnson v. Fecht*, 94 Mo. App. 605; *Wire Co. v. Broderick*, 12 Mo. App. 378; *Egger v. Nesbit*, 122 Mo. 667; *Taylor v. Williams*, 45 Mo. 80; *Strange v. Crowley*, 91 Mo. 287; *McLean v. Pastime, etc.*, 64 Mo. App. 55.

(2) A ratification by the principal of a contract for the sale of the principal's land made by an agent without written authority must be in writing. *Johnson v. Fecht*, 185 Mo. 345; *Hawkins v. McGroarty*, 110 Mo. 546. (3)

There is nothing better settled in the law of this State than the fact, that a party seeking to take advantage of an estoppel, must plead it. *Realty Co. v. Musser*, 97 Mo. App. 114; *Calter v. Gray*, 159 Mo. 588; *Golden v. Tyre*, 180 Mo. 196; *Cockrell, v. Hutchinson*, 135 Mo. 75; *Weise v. Moore*, 22 Mo. App. 530; *Throckmorton v. Pence*, 121 Mo. 60; *Bray v. Marshall*, 75 Mo. 327; *Avery v. Railroad*, 113 Mo. 561; *Noble v. Blount*, 77 Mo. 235; *Messersmith v. Messersmith*, 22 Mo. 372; *Hammerslaugh v. Cheatham*, 84 Mo. 21; *Plow Co. v. Long*, 55 Mo. 356. (4)

A reply cannot be used in aid of the petition to engraft thereon a material allegation which has been omitted from the petition. *Rhodes v. Land Co.*, 105 Mo. App. 279; *Magruder v. Admire*, 4 Mo. App. 133.

STATEMENT.—Action brought in the circuit court of Montgomery county, to recover the sum of two hundred dollars, alleged to have been paid by plaintiff on account of purchase of land claimed to have been purchased by him from Missouri Summers, and also for \$2180 damages for the breach of the alleged contract of sale. The contract sued on, which is dated October 6, 1903, provides, in substance, as averred in the petition, that Missouri Summers will, on or before the sixth of November next ensuing its date, at the proper cost and charge of plaintiff, by good and lawful deed, convey unto plaintiff, in fee-simple, clear of all incumbrances, 198 acres of land, in Montgomery county, particularly

described, in consideration that plaintiff, on the execution of the deed, will pay or cause to be paid to Missouri Summers \$3800 in manner following: \$1800 on delivery of the deed; \$200, to be part of the \$1800, upon the signing of the contract, the balance of the \$3800 due in two years at 5 per cent interest per annum from the first of March, 1904, for which balance plaintiff is to give to Missouri Summers, a deed of trust "with sufficient security for the payment of the same, if required, and upon his, the said C. E. Moots, executing and delivering the deed of trust aforesaid, the said Missouri Summers shall give unto the said C. E. Moots possession on the first day of March, 1904." This agreement is signed thus: "N. F. Palmer & Co., (Seal.) Agents for Missouri Summers. C. E. Moots, (Seal.)"

The answer of Mrs. Summers, who is defendant's intestate and who was living at the time the action was brought, was first, a general denial; second, she avers that the only contract she ever entered into with Palmer & Company to sell the real estate described in the petition, was one authorizing them to sell it for the sum of \$3500 or \$17.50 per acre, "one-half cash and balance in one year, with six per cent interest from date of sale," she to pay Palmer & Company five per cent commission on the gross amount above mentioned and all over that price which the land may bring when sold by or through them, or if sold by her to any party to whom Palmer & Company have shown the property or given information of, or recommended the same; the agreement to remain in force for twelve months and thereafter until Mrs. Summers shall give thirty days written notice of withdrawal from sale. It is then averred that thereafter and before October 3, 1903, Mrs. Summers notified Palmer & Company that she rescinded and cancelled the contract and withdrew her land in the contract described from the market, and that Palmer & Company had no right or privilege to attempt to sell the same, and that "except as above stated she had never given any writ-

ten authority of any kind to N. F. Palmer & Company to act as her agents in regard to said land in any respect." She denies, in substance, that Palmer & Company or any member of that firm, were authorized by her to execute the contract sued on for her or in her name, or to sign her name to any contract or agreement of any other kind with plaintiff or any one else, or to receive any money or payment on any contract on her account; denies that she at any time authorized Palmer & Company or N. F. Palmer to make the alleged contract attached to plaintiff's petition and counted on therein for her or in her name, and avers that the alleged contract, if in fact executed by Palmer & Company, was made after she had rescinded and cancelled the authority given by her to Palmer & Company by the writing signed by her as above set forth and that the alleged contract was not in accordance with the provisions and terms of the authority to sell or in conformity therewith. Other defenses, not necessary to notice, are set up; the real defense being that the contract sued on is not the one she authorized Palmer & Company, by her written agreement with them, to make. She also denies having ever received the \$200, or any other sum on account of any contract from plaintiff.

After answering, and pending the action, Mrs. Summers died and defendant, as her duly appointed administrator, entered his appearances, waiving process, and adopted the answer theretofore filed by Mrs. Summers.

Plaintiff filed a reply which was a general denial of the new matter set up in the answer.

The case coming on for trial, N. F. Palmer being on the stand as a witness, the plaintiff offered in evidence the agreement between Palmer & Company and Mrs. Summers heretofore set out as embodied in the answer of Mrs. Summers. When the agreement was offered, it was objected to by the defendant, for the reason that it is not sufficient to authorize Palmer & Company

to make the contract sued on, that contract being materially different from the one authorized in the agency contract; that in the agency contract, the agent is authorized to sell for one-half cash, the balance in one year, with six per cent interest from date, whereas the contract sued on is for \$200 to be paid down, \$1800 at a certain time, the balance in two years, bearing five per cent interest with a provision that the interest will not begin until March 1, 1904, hence it was objected that the agency contract offered in evidence varies from that sued on and is not sufficient in form and substance to authorize the making of the contract sued on. This objection was sustained by the court and plaintiff duly excepted. Whereupon this occurred:

"Mr. Rosenberger (counsel for plaintiff): We further offer to show that Mrs. Summers did ratify this sale.

"Mr. Cullen (counsel for defendant): Have you that in writing? A. No, sir.

"Mr. Cullen: Then defendant objects."

The objection was sustained by the court, plaintiff duly excepting. The contract sued on was thereupon offered in evidence, and was objected to for the reason that "it does not appear that Mrs. Summers gave the agent any authority to issue such a contract." This objection was sustained by the court and exception duly saved by the plaintiff, whereupon this took place between the court and counsel:

"Mr. Rosenberger: If the court please, we desire to state our position. Our contention is that Mrs. Summers did authorize the witness here to sell her land, which contract the court refused to admit in evidence. Now, we offer Exhibit '2,' which is a contract for the sale of the place set out in the petition, and we expect to follow that evidence up by showing that this witness on the stand (Mr. Palmer) went to Missouri Summers and showed her this very contract which he had signed as her agent, and she told him that the same was per-

fectly satisfactory, and to go ahead and close up the deal.

"The Court: All verbal?

"Mr. Rosenberger: Yes, sir.

"The Court: I cannot allow that to come in; the objection is sustained. Plaintiff duly excepted."

In the view which we take of the case, it is unnecessary to set out the further testimony offered, other than to say that plaintiff offered testimony tending to show that after the agents had entered into the contract with plaintiff, Mrs. Summers was informed of it and made no objection to it until the question came up about the title and plaintiff demanded that the deed which was to be executed should be signed by her husband, or that she should procure the signature of her husband to it. He declined to do so, but was willing to make her own deed which plaintiff was unwilling to accept. It appears that Mrs. Summers and her husband, while not divorced, were living apart and having no dealings with each other. It was in evidence that the two hundred dollars earnest money had been paid by the plaintiff to the agents but no part of it was paid over to Mrs. Summers. Finally, Mrs. Summers refused to go on with the deal at all, whereupon this suit was brought. All this testimony was excluded under the general objection that it was not pretended that there had been any ratification in writing of the contract which was made by the agents and which is the contract sued on. Objection was also made to plaintiff testifying at all to the transaction between himself and Mrs. Summers, the latter being dead at the time of the trial.

At the conclusion of the testimony in the case, plaintiff asked leave to file an amended reply to conform to the proof. The reply set up that after the contract had been signed by the agents of Mrs. Summers, she had ratified the contract so made by her agents, with full knowledge and information as to the contents of the contract she was ratifying. The court declined to allow

this amendment on the ground that it was a departure from the pleading and on the ground that it was not sustained by the evidence in the case, there being no proof of the ratification in writing.

At the close of plaintiff's evidence, the court instructed the jury, over the objection and exception of plaintiff, that under the law and evidence the jury should find for the defendant. Whereupon the jury returned a verdict for the defendant. The plaintiff in due time filed a motion for a new trial which was overruled, exceptions saved, and the case is now here on appeal by plaintiff.

REYNOLDS, P. J. (after stating the facts).—It is provided by section 3418, Revised Statutes, 1899, that "no contract for the sale of lands made by an agent shall be binding upon the principal, unless such agent is authorized in writing to make said contract." It is beyond question in this case that there is such a substantial variance between the contract which the agents made with plaintiff, that is, the contract sued on, and the contract which Mrs. Summers had authorized her agents to make, that proof of the execution of the latter by Mrs. Summers did not help out or sustain the execution by the agents of the contract sued on. Necessarily, therefore, plaintiff's case failed, unless there was a ratification of the act of the agents in making the contract which they did make by Mrs. Summers and proof that that ratification was in writing.

Referring to the amendment engrafted on to section 3418, *supra*, by the Act of 1887, which added to the section the words above quoted, Judge MARSHALL, in *Johnson v. Fecht*, 185 Mo. 335, l. c. 343, 83 S. W. 1077, says that since the passage of that amendatory act it has uniformly been held that it is necessary to show that the agent had written authority "to make the contract which he does make," citing *Hawkins v. McGroarty*, 110 Mo. 546, 19 S. W. 830; *Roth v. Georger*, 118 Mo.

556, 24 S. W. 176; Fox v. Courtney, 111 Mo. 147, 20 S. W. 20; Greening v. Steele, 122 Mo. 287, 26 S. W. 971. In order to bind the principal by the contract of his agent, it must be shown that the authority given to the agent was in writing and was such authority as authorized the agent to make the contract sought to be enforced. Nor can the contract for a sale of realty which the principal gives the agent, authorizing the agent to make a certain contract, be varied by a subsequent parol agreement between them. [Rucker v. Harrington, 52 Mo. App. 481; Newman v. Bank of Watson, 70 Mo. App. 135; Beckmann v. Mephram, 97 Mo. App. 161; Warren v. Mayer Mfg. Co., 161 Mo. 112, 61 S. W. 644.] So that the attempt to show verbal acquiescence in the altered contract on the part of Mrs. Summers was, in effect, an attempt to vary by parol the contract which Mrs. Summers had authorized her agents to make. That this cannot be done has been held in many cases, of which those last cited are examples. No matter how much testimony might have been offered or introduced as to the oral declarations of Mrs. Summers, tending to show acquiescence in the altered contract, it all falls within the prohibitions of the statute. It is to be understood that we are speaking now of verbal assent, not of acts; for acts may raise an estoppel.

In the case of Johnson v. Fecht, *supra*, considering the question of ratification of a contract made without authority in the first instance, the court (l. c. 345), referring to Hawkins v. McGroarty, *supra*, and to other cases cited, holds that the ratification by a principal of a contract made by an agent, who had no written authority to make the contract in the first instance, must also be in writing, except where the principal was shown to have been guilty of such conduct as amounted to an equitable estoppel. While the original reply in this case was a general denial, setting up neither estoppel nor ratification, plaintiff, after the close of the evidence, as will be seen by the statement, offered to file an amend-

ed reply, which the court, however, declined to permit. Referring to that proposed reply, it will be observed that it pleads ratification. When the law requires a contract to be made in a particular manner, an allegation that it was made is always held to imply that it is made in lawful form. [Stillwell v. Hamm, 97 Mo. 579, 11 S. W. 252.] So that it is to be presumed that when plaintiff in the proposed amended reply, plead ratification, he intended legal ratification, which in this case, would be ratification in writing. Giving plaintiff the benefit of all that the proposed reply entitles him to, therefore, it is to be said that the court properly refused permission to file the amended reply for two reasons: First, it practically presented a new issue from that made by the petition, for the petition bottomed the action on the original contract, while the reply shifted it on to the ratification; and secondly, it was properly refused, because there was no evidence whatever in the case tending to show that any legal ratification, that is, a ratification in writing, had been made, exactly the contrary having been distinctly admitted by counsel for plaintiff when he said, in answer to a question of the court or in answer to an objection made, that it was not pretended or claimed that there had been a ratification in writing. Recurring to what is said in Hawkins v. McGroarty, *supra*, and repeated in Johnson v. Fecht, *supra*, that the ratification must be in writing, "except where the principal was shown to have been guilty of such conduct as amounted to an equitable estoppel," it is to be said in reference to the case at bar, that neither a plea of estoppel was entered, nor acts amounting to an estoppel plead, either in the petition or in the reply, or in the proposed amended reply, and it goes without saying, that an estoppel, to be available, must be plead.

Counsel for plaintiff refer us to the case of Gelatt v. Ridge, 117 Mo. 553, 23 S. W. 882, as authority for the proposition that subsequent ratification and approval is equivalent to prior authority and may be by parol,

but an examination of that case shows that it is one in which the agent was suing the principal for his commissions, and in such case it has been held in many decided cases, as for example *Gerhart v. Peck*, 42 Mo. App. 644, and *Gwinnup v. Sibert*, 106 Mo. App. 709, 80 S. W. 589, that it was not necessary that plaintiff should show a written authority to act as a real estate agent in order to entitle him to recover commissions on finding a purchaser. See also *Gelatt v. Ridge*, *supra*.

Our conclusion on the case is, that the contract sued on, not being the contract which the principal had authorized her agents to make in her written agreement with them, and there being no proof or tender of proof of ratification of the contract which was made having been by writing, and there being no plea of estoppel as against Mrs. Summers, by acts or conduct on her part, the trial court correctly excluded the contract sued on from evidence. That necessarily ended the plaintiff's case. It is wholly immaterial, therefore, to the determination of this case, to go into the other points so fully and learnedly briefed by counsel, touching errors in exclusion of testimony on other grounds, as on the capacity of witnesses to testify, or as to proof of conversations between Mrs. Summers and various parties to the transaction. Whether the court was right or wrong in its rulings on these questions, with the insuperable objection staring us in the face, that there was no written authority for making the contract which was made and no written ratification of it after it was made, it is impossible for plaintiff to recover in this action.

The judgment of the circuit court is affirmed. All concur.

**JULIUS KESSLER, Appellant, v. GEORGE CLAYES,
Administrator of the Estate of JOSEPH D.
LUCAS, Respondent.**

St. Louis Court of Appeals, February 1, 1910.

1. **INSTRUCTIONS: Failing to Hypothesize All the Facts: Appellate Practice: Presumption.** A requested instruction, which fails to hypothesize all the relevant facts in proof, is presumed to have been refused because of such failure.
2. **CONTRACTS: Evidence: Parole Evidence Admissible to Remove Ambiguity in Written Contract.** If the intention of the parties sought to be set forth in a written contract is not clear because of ambiguous language used therein, the ambiguity may be removed and the intention of the parties clarified by parole testimony; and while direct evidence as to the intention of the parties is incompetent, parole evidence is competent to show the parties' situation, the surrounding circumstance and the relation which the words of the writing may bear to facts which constitute the subject-matter of the contract.
3. **BILLS AND NOTES: Evidence: Parole Evidence Inadmissible to Impeach Written Contract.** Parole evidence is inadmissible to vary, contradict, add to, or subtract from, the terms of a written instrument, except in cases where, from fraud, mistake or illegality, it has not acquired original force as a contract.
4. **———: ———: Parole Evidence Inadmissible to Impeach Note.** Under the rule that parole evidence is inadmissible to impeach a written instrument, except in cases of fraud, mistake or illegality, parole evidence is incompetent to destroy the obligation of a promissory note as such and show it to be a mere receipt.
5. **———: Promise to Pay May be Implied.** It is sufficient if the promise to pay in a promissory note is either expressed in words or raised by the law as a necessary implication on an acknowledgment of indebtedness therein contained.
6. **CONTRACTS: Law Enters Into.** The legal import of every written undertaking is a part of the contract as well as the express obligations therein contained.
7. **BILLS AND NOTES: Consideration: Promise to Pay: Facts Stated.** Plaintiff, on surrendering certain stock to decedent, received from him an instrument containing the words, "Good

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for \$1000 . . . for ten shares Kinloch Jockey Club stock surrendered to the undersigned, . . . by the owner of said stock J. Kessler and for which I am liable. Joseph D. Lucas." *Held*, that the word "surrendered" did not mean mere delivery, but imported a transfer of title, a giving up or making over, a relinquishment of a right or privilege, and that the words "Good for \$1000" and "for which I am liable" imported a promise on decedent's part to pay plaintiff \$1000 for the stock, so that the instrument contained all the elements of a note, as between the parties.

8. ———: **Requisites.** The essential elements of a note are, that it must be in writing, must contain a promise to pay, either express or implied, that the promise must be for the payment of a certain sum of money absolutely and at all events, that the promise must be unincumbered with collateral agreements to do something else, and that the instrument must indicate with certainty the parties to the contract.
9. ———: **Identity of Payee.** A note sufficiently identifies the payee if it discloses from whom the consideration was received, and the promise is interpreted to be a promise to pay him from whom the consideration moved.
10. ———: **Negotiable: Necessity of Words of Negotiability.** A note in the form "Good for \$1000 . . . for ten shares Kinloch Jockey Club stock surrendered to the undersigned . . . by the owner of said stock J. Kessler and for which I am liable. Joseph D. Lucas," is *held* to be a non-negotiable note for the reason it contains no word of negotiability, but *held* to be a promissory note and as such entitled to the prerogatives and attributes incident to such obligations.
11. ———: **Evidence: Parole Evidence Inadmissible to Impeach Note: Consideration May be Contradicted.** Except in cases of fraud, mistake or illegality, or total or partial failure of consideration, parole evidence of a verbal agreement made at the time of, or prior to, the execution of a promissory note absolute on its face is not to be received to qualify, contradict, vary, subtract from or add to its terms; but the consideration is always open to contradiction between the immediate parties to the note, and the want or illegality of consideration may be proved by parole evidence.
12. **APPELLATE PRACTICE: Judgments: Presumption in Favor of.** Since all presumptions are indulged in favor of the judgments of the trial court, in the absence of erroneous declarations of law, such a judgment will be affirmed on appeal, if it may be sustained on any theory of law within the pleadings, although the appellate court is unable to discern the precise ground on which it was given.

13. **PLEADING: Probate Courts: Formal Pleadings not Required.** Formal pleadings are not required in proceedings in probate courts, under section 200, Revised Statutes 1899.
14. ———: ———: **Formal Pleadings not Required in Circuit Court on Appeal.** On appeal from the probate court, no formal pleadings are required in the circuit court, since that court proceeds to try and determine the cause anew, under section 285, Revised Statutes 1899.
15. **BILLS AND NOTES: Failure of Consideration: Evidence Reviewed.** Defendant's decedent gave plaintiff an instrument in the following form: "Good for \$1000 . . . for ten shares Kinloch Jockey Club stock surrendered to the undersigned . . . by the owner of said stock J. Kessler, and for which I am liable. Joseph D. Lucas." In an action on said note, on a review of all the evidence, *held* the stock referred to in said note, together with other stock of like kind, was accumulated for the purpose of depositing it with a trustee who was acting for all the stockholders in a reorganization scheme, and that the equitable title of said stock at least remained in plaintiff, and, therefore, the maker of the note received no consideration therefor from plaintiff.

Appeal from St. Charles Circuit Court.—*Hon. James D. Barnett*, Judge.

AFFIRMED.

W. G. Schofield for appellant; *Frank A. Thompson* of counsel.

(1) (a) The instrument sued on is a promissory note, with actual consideration stated. *McGowen v. West*, 7 Mo. 569; *Finney v. Shirley*, 7 Mo. 42; *Brady v. Chandler*, 31 Mo. 28; *Brainard v. Capelle*, 31 Mo. 428; *Jacquin v. Warren*, 40 Ill. 459; *Franklin v. March*, 6 N. H. 364; *Locher v. Kuechenmiester*, 120 Mo. App. 701. (b) But this action originating in probate court where no pleadings are required, it is immaterial whether instrument is or is not a promissory note. *Lee v. Dunlap*, 55 Mo. 454. (c) The consideration, being stock of par value of \$1000, was sufficient to support the promise or obligation sued on. *Houck v. Frisbee*,

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66 Mo. App. 20; Kamp Co. v. Mfg. Co., 64 Mo. App. 117. (d) The instrument sued on recites that it is good for \$1000 for stock surrendered. The word "surrender" in law means cancelled or yielded up and a transfer of the title as well as the possession. Buck v. Lewis, 46 Mo. App. 232; Robertson v. Winslow, 99 Mo. App. 546; Evans v. United States, 153 U. S. 591; In re Welling, 113 Fed. Rep. 192; Nolander v. Burns, 48 Minn. 13, 50 N. W. 1016; In re Dronfield, etc., Coal Co., 17 Ch. Div. 76. (e) Upon being indorsed in blank by claimant Kessler, the title passed to the certificates and they partook of the qualities of a negotiable security so as to pass from hand to hand by delivery. Kessler v. Mfg. Co., 43 Mo. App. 84; St. Louis, etc., Co. v. Partridge, 8 Mo. App. 580. (f) The words "and for which I am liable" while superfluous, necessarily refer to \$1000. But even if this was not so, the evident intent from a common sense interpretation should be borne in mind. State ex rel. v. St. Louis, 174 Mo. 141. (2) While parol contemporaneous evidence is not admissible to contradict or vary the terms of a valid written instrument, still when the subject-matter therein is not entirely clear, parol contemporaneous evidence is permissible in order that the court may more perfectly understand the intent and meaning of the parties, and the court should not have excluded the offer of evidence on that point. Construction Company v. Tie Co., 181 Mo. 25; Edwards v. Smith, Admr., 63 Mo. 126; Smith v. Van Wyck, 40 Mo. App. 526; Garst v. Good, 50 Mo. App. 151.

T. J. Rowe and Henry Rowe for respondent.

It has been laid down in many cases as a general rule that extrinsic evidence is not admissible to remove a patent ambiguity, and that the instrument is inoperative and void. This rule, however, should be stated with qualification. The true doctrine seems to be, that

while direct evidence of intention is not admissible in explanation of ambiguous terms in a writing, yet proof of collateral facts and surrounding circumstances existing when instrument was made, may be properly admitted in order that the court may be placed as nearly as possible in the situation of the testator or the contracting parties, as the case may be, with a view the better to adjudge in what sense the language of the instrument was intended to be used and to apply it to the subject-matter. *Davis v. Davis*, 8 Mo. 56; *Bell v. Dawson*, 32 Mo. 79; *Campbell v. Johnson*, 44 Mo. 247; *Carter v. Holman*, 60 Mo. 498. Evidence of acts under the instrument is admissible as showing the practical construction which the parties themselves placed upon the instrument. *Gas Light Co. v. St. Louis*, 46 Mo. 121; *Ellis v. Harrison*, 104 Mo. 270; *Topliff v. Topliff*, 122 U. S. 131.

NORTONI, J.—This is a suit on a promissory note. The trial was had before the court without a jury. After taking the case under advisement, judgment was given for defendant, and the plaintiff appeals. The plaintiff filed the instrument sued upon as a demand against the estate of J. D. Lucas, deceased, in the probate court of St. Louis county. It was allowed and the estate appealed to the circuit court. Afterwards a change of venue was awarded to the circuit court of St. Charles county from whence comes the present appeal.

The instrument sued upon is as follows:

“Bridgeton, Mo., Nov. 28, 1902.

Good for \$1000, one thousand dollars, for ten shares Kinloch Jockey Club stock surrendered to the undersigned, J. D. Lucas, by the owner of said stock, J. Kessler and for which I am liable.

JOSEPH D. LUCAS.”

It is to be noted that the instrument bears date prior to the enactment of our negotiable instrument

law of 1905 and the case is to be treated wholly irrespective of the provisions of that act.

We are unable to say upon what theory the court gave judgment for the defendant. No declarations of law were given and we are therefore unaided by anything in the record indicating the views of the court as to the law of the case. It is true the court refused one request by the plaintiff, but as this declaration failed to hypothesize all of the relevant facts in proof, it is of course presumed to have been refused for that reason. Although it is not clear on what theory the court gave judgment for the defendant, its judgment is sought to be sustained here on the proposition that the instrument sued upon is not a promissory note. If such is the theory of the judgment, then we believe it to be erroneous. On the other hand, if the judgment of the court was given for defendant on the theory that there was a failure of consideration for the note, then we believe it may be sustained. The argument advanced by the defendant is to the effect that the instrument in suit is not a note but is rather merely a receipt which the deceased executed to the plaintiff for ten shares of stock in the Kinloch Jockey Club. It is said the instrument is ambiguous in its terms and therefore it is proper to receive parol testimony showing the situation of the parties and the circumstances surrounding them, to the end of elucidating the intention in that behalf. Generally speaking, if the intention of the parties sought to be set forth in a written contract is not clear because of ambiguous language used therein, the ambiguity may be removed and the intention of the parties clarified by parol testimony to the extent mentioned. In other words, while direct evidence as to the intention is incompetent, it is always competent to receive parol testimony to the end of showing the situation of the parties, the surrounding circumstances and the relation which the words of the writing may bear to facts which constitute the subject-matter of the contract. [Ellison

v. Harrison, 104 Mo. 270, 16 S. W. 198; Davis v. Davis, 8 Mo. 56; Bell v. Dawson, 32 Mo. 79; Campbell v. Johnson, 44 Mo. 247; Carter v. Holman, 60 Mo. 498; Laclede Construction Co. v. Moss Tie Co., 185 Mo. 25, 84 S. W. 76; Greenleaf on Evidence, sec. 288.]

Be this as it may, except in cases where from fraud, mistake or illegality the instrument has not acquired original force as a contract, parol evidence is inadmissible to vary, contradict, add to or subtract from the terms of a written instrument. The rule proceeds upon the presumption that the parties have placed their entire engagement in writing, therefore, if the instrument imports a legal obligation with certainty, it alone shall be permitted to give evidence as to the terms of the agreement. [Tracy v. Union Iron Works Co., 104 Mo. 193, 16 S. W. 203; Laclede Construction Co. v. Moss Tie Co., 185 Mo. 25, 84 S. W. 76; Greenleaf on Evidence, sec. 275.] Under this rule, it is clear that if the instrument sued upon is a promissory note, then parol testimony is incompetent to destroy its obligation as such and show it to be a receipt instead. As to the general proposition that a promissory note may not be shown by parol to have been intended as a mere receipt, see the following authorities in point: Billings v. Billings, 10 Cush. Mass. 178; Dickson v. Harris, 60 Ia. 727; Daniels on Negotiable Instruments (5 Ed.), sec. 80. But it is said the instrument is not a promissory note for the reason it contained no promise to pay. It is sufficient if such a promise is either expressed in words or is raised by the law as a necessary implication on an acknowledgment of indebtedness therein contained. [Daniels on Negotiable Instruments, sec. 37.] There are numerous cases in the books of this State and elsewhere to the effect that mere due bills are promissory notes within the meaning of the law even though no promise to pay the indebtedness acknowledged to be due is expressed in words therein. See the following: McGowen v. West, 7 Mo. 569; Finney v. Shirley, 7 Mo. 42; Brady

v. Chandler, 31 Mo. 28; Jacquin v. Warren, 40 Ill. 459; Locher v. Kuechenmiester, 120 Mo. App. 701, 98 S. W. 92. And so a paper reciting "received of H. Doane for Samuel A. Reyburn, \$180, Potosi, November 16, 1850," signed by J. H. Casey, was declared to be a note upon which Reyburn, the third party, in whose favor the money was received by Casey, could maintain an action; the principle asserted being that the acknowledgment of having received the money payable to Reyburn raised a promise by implication of law to pay the same to the party named. [Reyburn v. Casey, 29 Mo. 129.]

In Franklin v. March, 6 N. H. 364, the instrument sued upon and held to be a note was as follows: "October 19, 1830. Good to Robert Cochran, or order, for \$30 borrowed money. Joseph W. March," it appearing that it was founded upon a sufficient consideration, borrowed money, the words, "Good to Robert Cochran" were therefore said to clearly signify an acknowledgment of indebtedness in the amount mentioned and the instrument declared a promissory note by an application of the principle that the law implies a promise to pay the indebtedness thus acknowledged.

In Hussey v. Winslow, 59 Me. 170, the instrument sued upon was as follows: "Nobleboro, October 4, 1869. Nathaniel O. Winslow, Cr. By labor 16 3-4 days at \$4.00 per day, \$67. Good to bearer, Wm. Vannah." The instrument was held to be a promissory note. It appearing the consideration was for 16 3-4 days' labor at \$4. per day amounting in all to \$67, the court declared the words, "Good to bearer" in this connection clearly indicated an acknowledgment of indebtedness in the amount mentioned and that inasmuch as the indebtedness was acknowledged, the law raised or implied the promise to pay the same.

It cannot be denied that on principle the law enters as a silent factor into every contract and the parties essentially assume and enter into mutual obligations with this in mind. Indeed, what is implied in an express

contract is as much a part of it as what is expressed. In other words, the legal import of every written undertaking is a part of the contract. [Long v. Straus, — Ind. —, 4 West. Rep. 235; Rodney v. Wilson, 67 Mo. 123, 124; Bishop on Contracts, sec. 121.]

The instrument in suit reads: "Bridgeton, Mo., Nov. 28, 1902. Good for \$1000, one thousand dollars, for ten shares Kinloch Jockey Club stock surrendered to the undersigned, J. D. Lucas, by the owner of said stock, J. Kessler, and for which I am liable. Joseph D. Lucas." It will be observed that it expresses the consideration for which it was given, that is, ten shares of Kinloch Jockey Club stock, surrendered to the maker of the obligation. It is true neither of the words, "sold," "purchased" nor "assigned" is employed. However, such is not essential to a note. Be this as it may, the word, "surrendered" in a sense involves the idea of transfer of title. The Supreme Court of the United States said in the case of Evans v. United States, 153 U. S. 584, 591, "Indeed, the word 'surrendered' carries with it something more than bare delivery, and indicates a transfer of title as well as of possession." Bouvier's Law Dictionary, in treating of the word "surrendered" as applicable to estates in real property, among other things, says a surrender immediately divests the estate of the surrenderor and vests it in the surrenderee. Anderson's Law Dictionary, among other things, says the word "surrender" means to give up or make over. The Standard Dictionary defines the word "surrender" to mean to relinquish, as to surrender a right or privilege and gives as one of its synonyms of the word, "alienate," which word it says means to make over to another as the title or right. It appearing on the face of the instrument that the thousand dollars mentioned therein is for ten shares of stock in the Kinloch Jockey Club, surrendered by J. Kessler, the owner, to J. D. Lucas, the maker of the obligation, the result is, if we give the word "surrendered" the full meaning it imports, that according to

the face of the instrument, Mr. Kessler had transferred both the possession and title of such stock to Mr. Lucas. The paper writing vouchsafes that it is good for one thousand dollars for such expressed consideration. In these circumstances, the words, "good for \$1000" essentially signify an acknowledgment of indebtedness to that extent. If an indebtedness be thus acknowledged, the law, which operates as a silent factor in the contract, raises from and implies an obligation incurred in the indebtedness a promise to pay the same. Besides Daniels on Negotiable Instruments (5 Ed.), sec. 36a and 37, see authorities *supra*.

The essential elements of a promissory note are: First, that it must be in writing; second, it must contain, either expressed or implied, a promise to pay; third, the promise must be for the payment of a sum certain of money absolutely and at all events; fourth, the promise must be unencumbered with collateral agreements to do something else; and fifth, the instrument must indicate with certainty the parties to the contract. And under the old law, it was essential that it be not sealed. [4 Am. and Eng. Ency. Law, (2 Ed.), 81.] The instrument before us presents each and all of the elements mentioned. As to the identity of the payee, it is sufficient if the note discloses from whom the consideration was received. In such circumstances, the promise is interpreted to be a promise to pay him from whom the consideration moved. [Story on Bails and Notes, sec. 36; *Green v. Davis*, 4 B. & C. 235; *Hussey v. Winslow*, 59 Me. 170, 172.] It appearing that the consideration recited in the note moved from J. Kessler, the owner, of the stock, for which the indebtedness is acknowledged, the law implies and interprets the promise to him.

Although the concluding words of the instrument "and for which I am liable" are of doubtful import and seem in a measure to relate back and refer to the stock as though Mr. Lucas acknowledged himself to be liable

for such stock, they seem as well to relate to the obligation to pay one thousand dollars as therein indicated. It is true these words may be treated as surplusage if they relate to the obligation to pay one thousand dollars, for enough appears without them to affix the obligation. However, the obligation and promise of the note are so clearly fixed on a consideration stated that we are unable to declare it not to be a note on account of the words referred to. If the parties intended the paper as a receipt or as evidence of an obligation to return the stock instead of one to pay the money, how easy it would have been to have written, "Good for ten shares of stock in the Kinloch Jockey Club of the par value of one thousand dollars, surrendered to the undersigned, J. D. Lucas, by the owner of said stock, J. Kessler, and for which I am liable." It is to be noted that the obligation contracted, instead of being for ten shares of stock, is "good for \$1000," and the concluding words "and for which I am liable" are entirely consistent with the acknowledgment of indebtedness and implied promise to pay in the note.

Of course, the instrument is not a negotiable note, for the reason it contains no words of negotiability. [R. S. 1899, sec. 457; *Bailey v. Smock*, 61 Mo. 213; *Taylor v. Newman*, 77 Mo. 257; *International Bank v. German Bank*, 3 Mo. App. 362, 365.] However this may be in the judgment of the law, it is a promissory note and as such is entitled to the prerogatives and attributes incident to such obligations.

Besides the force of the general rule above referred to which precludes the reception of parol testimony to vary, contradict, add to, or subtract from, the terms of a written instrument generally, the principle is especially pertinent to promissory notes for the reason the law merchant affords a sort of special sanctity to these instruments. Therefore, except in cases of fraud or mistake or illegality, or total or partial failure of consideration, parol evidence of a verbal agreement made

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at the time of, or prior to, the execution of the note, is not to be received to qualify, contradict, vary, subtract from or add to the terms of a note which is absolute on its face. The authorities are numerous. [Jones v. Jeffries, 17 Mo. 577; Smith v. Thomas, 29 Mo. 307; Jones v. Shaw, 67 Mo. 667; Rodney v. Wilson, 67 Mo. 123; Gardner v. Mathews, 81 Mo. 627; Sigler v. Booze, 65 Mo. App. 555; Holmes v. Farris, 97 Mo. App. 305, 71 S. W. 116; Trustees of Christian University v. Hoffman, 95 Mo. App. 488, 69 S. W. 474; Massmann v. Holscher, 49 Mo. 87; 4 Am. and Eng. Ency. Law, (2 Ed.), sec. 146, 147, 148, 149, 150, 151, 152, 153, 154; Daniels on Negotiable Instruments, (5 Ed.), sec. 80, 81.]

In affirmance of this doctrine, the right to contradict or vary the terms of a note has been denied under varying circumstances in many cases. Thus, where a note is payable on demand, it cannot be shown by verbal testimony that it was agreed it should not be paid until after the decease of the testator. [Woodbridge v. Spooner, 3 B. & Ald. 233; Graves v. Clark, 6 Blackf. 183.] Nor until after the sale of the maker's estate. [Getto v. Binkert, 55 Ks. 617, 40 Pac. 925; Free v. Hawkins, 8 Taunt, 92; 1 J. B. Moore, 535.] The rule forbids, too, the showing that a note in which no time for payment is expressed and is therefore constructively payable on demand, was to be paid at a specified time. [Thompson v. Ketcham, 8 Johns, 189.] Nor will the maker be permitted to show by parol that the note was given as an indemnity against certain claims. [Ridout v. Bristow, 1 Crompt. & J. 231.] It likewise precludes a showing by parol that the amount promised was to be paid only on condition that an endowment fund of \$50,000 was raised before a certain date. [Trustees of Christian University v. Hoffman, 95 Mo. App. 488, 69 S. W. 474.] And as before stated, parol evidence is not admissible to contradict or vary the terms of the note by showing that the parties intended a receipt instead. [Billings v. Billings, 10 Cush. (Mass.),

178; *Dickson v. Harris*, 60 Ia. 727.] Nor that the note was given merely as a matter of form unless it be under the rule as for failure of consideration. Indeed, the rule forbids the reception of parol testimony to remove a patent ambiguity on the face of the note when to do so involves either adding to or subtracting from the language therein employed, other than that pertaining to the consideration. [*Griffith v. Furry*, 30 Ill. 251, 83 Am. Dec. 186; *Brown v. Bebee*, 1 D. Chipman, 227, 6 Am. Dec. 728; 4 Am. and Eng. Ency. Law (2 Ed.), 154; *Wright v. Remington*, 12 Vrooman (N. J.) 48; *Daniels on Negotiable Instruments* (5 Ed.), secs. 80, 81 and 81a.] From the instances cited, it is obvious the principle applies to every element of the instrument essential to the obligation vouchsafed therein, except the consideration. [*Daniels on Negotiable Instruments*, sec. 81.] It therefore appears that in so far as the testimony introduced sought to convert the instrument into a receipt for the stock instead of a promissory note, it was incompetent for the reason the law will not permit that which it declares to purport the obligation of a promissory note to be converted into an instrument of another character by means of parol testimony which is always regarded uncertain.

However, the rule of law above stated does not obtain with respect to such recitals in the note as pertain to the consideration on which it is founded. In other words, the matter of consideration is always open between the immediate parties to the instrument, as here, to contradiction. The want or illegality of consideration may be proved by parol to show that the agreement is not binding and valid in law to the full extent indicated therein. [*Greenleaf on Evidence*, secs. 284, 304; 4 Am. and Eng. Ency. Law (2 Ed.), secs. 196, 199, 200; *Hacker v. Brown*, 81 Mo. 68; *Daniels on Negotiable Instruments*, (5 Ed.), sec. 81a.] Our statute, section 645 Revised Statutes 1899, pointedly provides that whenever a written contract is the foundation of an

action the proper party may prove the want or failure of the consideration thereof in whole or in part. That it is competent to prove by parol there is a want or failure in whole or in part of the consideration for which a promissory note is given has often been affirmed under this statute. See the following cases in point: *Murphy v. Gay*, 37 Mo. 535; *Barr v. Baker*, 9 Mo. 840; *Williams v. Mellon*, 56 Mo. 262; *Brockhaus v. Schilling*, 52 Mo. App. 73; *Danforth v. Crookshanks*, 68 Mo. App. 311; *Holmes v. Farris*, 97 Mo. App. 305, 71 S. W. 116. As the consideration for which the note is given is always open to investigation or contradiction, the rule admitting parol testimony to that end permits a review and examination of the transaction which occasioned the note to be given in the first instance. In other words to the end of showing a partial or total failure of consideration for the note, it is competent to receive parol testimony as to the precise character of the antecedent transaction which resulted in the execution of the note. The rule has been applied in this State by our Supreme Court in a recent case between the original parties wherein the maker of the notes was permitted to show that they were accommodation instruments in the first instance and therefore wholly without consideration. See *Chicago Title & Trust Co. v. Brady*, 165 Mo. 197, 65 S. W. 303. This court also recognized and applied the rule in *Holmes v Farris*, 97 Mo. App. 305, 71 S. W. 116. See also the following authorities in point: *Leighton v. Bowen*, 75 Mo. 504; *Shoe & Leather Bank v. Wood*, 142 Mass. 563; *Gale v. Harp*, 64 Ark. 462, 43 S. W. 144; *Juillard v. Chaffee*, 92 N. Y. 529.

Although the evidence in the record was introduced for the purpose of showing the note was a receipt instead, it tends, with great force, to prove that the deceased maker, Mr. Lucas, actually received no consideration whatever therefor. As stated, we are unable to discern the precise ground upon which the judgment was given for defendant, but, in the absence of erroneous dec-

larations, if it may be sustained on any theory of law within the pleadings, it should be affirmed. In such circumstances, all presumptions go in favor of the judgment of the trial court. The case having originated in the probate court, no formal pleadings are required. [Sec. 200, R. S. 1899.] The same is true on appeal to the circuit court, for that court proceeds to try and determine the cause anew on the pleadings as before. [R. S. 1899, sec. 285; *Cole Co. v. Dallmeyer*, 101 Mo. 57, 13 S. W. 687; *Wencker v. Thompson*, 96 Mo. App. 59, 69 S. W. 743.] It therefore appears that the defense of failure of consideration was open to the defendant and that it was competent for the trial court to treat with the evidence before it on that score. The evidence introduced tended to prove that the Kinloch Jockey Club was a corporation of which the deceased maker of the note, Joseph D. Lucas, was president and payee, Julius Kessler, was a stockholder; that although it owned some assets, it was insolvent at the time the note was given and its stock was of slight value. It appears Mr. Lucas and one Chew held a deed of trust on its property for the sum of \$23,500; that this deed of trust had matured and was about to be foreclosed. It appears, too, the parties were considering the matter of having a trustee buy in the property at the mortgage sale and use it in connection with a new Jockey Club to be thereafter formed and incorporated. All of the parties were to accept stock in the new concern for that surrendered in the old and in certain pro rata proportion thereto. It seems that Mr. Lucas, the president of the insolvent corporation, was accumulating the stock with this end in view, for it is in testimony that he delivered practically all of the stock to Mr. Chew, who in turn delivered it to Edward Murphy, as trustee for all of the parties under a contract signed about five weeks after the note was given. The plaintiff, Kessler, owned stock of the par value of one thousand dollars in the insolvent corporation, represented by two certificates, numbered 30 and

31. These he assigned in blank and delivered to Mr. Lucas, the maker of the note at the time the note was executed. Along with other certificates of stock accumulated by Mr. Lucas, he handed these to Mr. Chew, the secretary of the association, to be deposited with Mr. Murphy, the trustee for all of the parties. It appears that on January 2, 1903, or within five weeks after the note was given, all of the parties owning stock in the Kinloch Jockey Club signed an article of agreement by which Edward Murphy was appointed trustee to hold the stock owned by each of them and to act for the parties thereto in buying in the property of the insolvent corporation at the contemplated sale under the deed of trust held by Lucas and Chew for \$23,500. The plaintiff signed this document as the owner of the ten shares of stock above referred to. He concedes that he signed the same and that he therein represented himself as the owner of the identical stock which he claims to have sold five weeks before to Mr. Lucas, but he says that he signed it at the instance of Mr. Lucas to aid him in concealing from the other stockholders that he, Lucas, had purchased the ten shares of stock mentioned. Of course, the question of the witness' veracity in respect of this and other matters was one for the trial court. The purport of the entire proof is that Mr. Lucas accumulated this and other stock for the purpose of depositing it with the trustee who was acting for all of the parties and that the equitable title of this stock at least remained in Mr. Kessler. Besides the other proof referred to, the circumstance that the plaintiff signed the document of January 2, 1903, representing himself as still the owner of the stock theretofore delivered to Mr. Lucas and in turn delivered to Chew and Murphy, trustees, points with convincing force to the conclusion that although Lucas executed the note he in fact received no consideration therefor from the plaintiff.

In answer to the suggestion that in the former part of the opinion we have treated the word "surrendered"

employed in the note as involving the idea of a passing of title in the stock to Mr. Lucas as consideration for the note and that it is now said the evidence tends to prove that no such title passed, it may be said that the court is not precluded by such recitals of the note as pertain to the consideration. The reasoning with respect to the word "surrendered" in the prior portion of the opinion goes only to the effect of demonstrating that such was a valid and sufficient consideration, if true, to support the promise implied in the note, whereas the question now under consideration relates instead to the want of consideration. In other words, the recital of the consideration in the note including the word "surrendered" is sufficient for the prima facie purposes of the note, whether true or untrue in point of fact, but wholly insufficient to support the obligation if it appears as a fact that the title to the stock was never transferred to the maker of the note. No one can doubt that although every other element of the note is protected by the rule forbidding the reception of parol testimony, the recitals therein pertaining to the consideration may be contradicted and overthrown upon a showing of fact to the contrary.

We believe there is substantial evidence in the record tending to support the judgment on the theory that there was no consideration given for the note, for it sufficiently appears that the title in the shares of stock remained in the plaintiff.

The judgment should be affirmed. It is so ordered. All concur.

**In re Estate of TAYLOR PURL, Deceased. W. L. GUP-
TON, Executor, Appellant, v. INEZ CARR, Re-
spondent.**

**St. Louis Court of Appeals. Argued and Submitted January 5, 1910.
Opinion Filed February 1, 1910.**

1. **APPELLATE PRACTICE: Issues not Presented Below.** The Court of Appeals, in cases involving the allowance of an executor's claim for compensation, will determine such issues only as were before the trial court.
2. **BANKS AND BANKING: Private Bank: Not Quasi Corporation.** A private bank carried on by an individual is not a quasi corporation under the banking law.
3. ———: ———: **Death of Banker: Probate Court Has Jurisdiction of Assets.** Where the owner of a private bank dies, and the bank is solvent, the Secretary of State has no authority, under section 1305, Revised Statutes 1899, to step in and administer the affairs of the bank through a receiver; the probate court having sole jurisdiction.
4. ———: ———: **Depositors General Creditors of Bank.** The depositors in a private bank, the sole owner of whose assets died, were general creditors of the bank, and had no special lien on the funds thereof.
5. ———: ———: ———: **Executor Entitled to Possession of Funds.** The deposit funds of a private bank went, on the death of the banker, who was sole owner of the assets, into his estate, his executor being the only person entitled to take possession of such funds and distribute them to the creditors of the bank.
6. **EXECUTORS AND ADMINISTRATORS: Commissions.** An executor or administrator is entitled to commission on all the personal property of the estate which came into his hands and for which he has accounted without default and in accordance with the law.
7. ———: ———: **Executor Entitled to Commission on Disbursements of Private Bank Funds.** An executor who pays out funds of a private bank, which was owned solely by his testate, to the depositors thereof, is entitled to commission on such payments, although the claims had not been presented to the probate court for allowance.

8. ———: ———: ———: Estoppel: Agreement of Distributee.

A distributee of an estate, who entered into an agreement whereby the executor was authorized to pay the depositors in a private bank, which was owned by the testator, from the funds of said bank, was estopped to assert the executor was not entitled to commission on such disbursements because the claims of the depositors were not presented to the probate court for allowance.

Appeal from Montgomery Circuit Court.—*Hon. Jas. D. Barnett*, Judge.

REVERSED AND REMANDED (*with directions*).

Ball & Ball for appellant.

As to the jurisdictional question, we insist that the will of the deceased gave his executor jurisdiction of the subject-matter, and it authorized him to conduct and manage the affairs of his private bank to the best advantage of his estate, and there is no question but that it was so managed. "Both at law and equity the whole personal estate of the deceased vests in the executor." *Hounson v. Moore*, 18 Mo. App. 410. The executor was rightfully in possession of the banking interest of the decedent, because the title to the personalty vests in him, *Langston v. Canterbury*, 173 Mo. App. 131. This same doctrine is upheld in 209 Mo. 494, and in the 124 Mo. App. 243. "The law looks to substance (results) rather than mere form." The objection to the item of commission of five per cent on the amount paid the 213 depositors should have been found in favor of the executor, as it is clear from all the record that although the 213 vouchers paid to as many parties were not allowed against the estate, as provided in sec. 224, yet at the time credit therefor was taken in his settlement, exceptor was urging payment to all, and now says the payment thereof by the executor was proper, thus bringing these credits within the terms of sec. 224, R. S. 1899. And the evidence in this court shows that all of them were legal demands against the estate, and the executor has paid them. *Jacobs v. Jacobs*, 99 Mo. 435.

E. Rosenberger & Son for respondent.

(1) the probate court had no jurisdiction to wind up the affairs of the Exchange Bank of Jonesburg, it being a private banking institution operating under secs. 1298, 1299, 1300, and 1301 R. S. 1899. The proper method to wind up the affairs of a private banking institution is by having a receiver appointed by the circuit court. After the receiver has wound up the affairs of the private banking institution, the surplus remaining over, if any, should then be paid to the executor and the net assets then, for the first time, become a part of the general estate. (2) An executor is only allowed to take credits for such sums as he has paid out in a legal manner, and is not allowed to pay claims and take credit therefor unless the claim has been legally allowed. In *re* Garrison v. Trust Co., 77 Mo. App. 333; Grocer Co. v. Walton, 95 Mo. App. 526; Hitchcock v. Mosher, 106 Mo. 578; Langston v. Canterbury, 173 Mo. 122.

STATEMENT.—Taylor Purl carried on the business of a private banker, having complied with the requirements of section 1299, of the Revised Statutes of 1899, as amended by Act of March 24, 1903, Laws 1903, p. 117, by filing with the Secretary of State the certificate required by that section. The capital invested was stated to be five thousand dollars, and the banking business was to be carried on under the name of the Exchange Bank of Jonesburg, Missouri. He was the sole owner of the bank and remained so until the day of his death, which latter event occurred about December 28, 1905. Mr. Purl made and executed a will, which was duly admitted to probate by the probate court of Montgomery county, December 29, 1905. By this will he directed that the executor named should at his death take charge and control of all of his property and out of the proceeds pay all his just debts, including funeral and cemetery

expenses. By the second clause he bequeathed and devised to his only daughter, Inez Purl Carr, all of his property remaining after the payment of debts, Inez Purl Carr, being his only heir and, as noted, sole legatee. The will appointed William L. Gupton executor. A codicil added to the will December 7, 1901, and duly probated with it, recited that as the testator had sufficient property other than his private banking institution, to pay any and all of his debts, it was his will that the business of the bank be continued after his death under such management as his executor might select and until such time as the bank might be sold or otherwise disposed of to the best interests of the depositors therein, the executor to act at all times under the direction of the state banking department of the State of Missouri. It appears that the executor filed two inventories of the estate, what is called inventory number 1 being of what is designated the private estate of the testator other than the Exchange Bank. This is not set out in the abstract. Inventory number 2 is of the assets pertaining to the banking business, setting out not only the assets of the Exchange Bank, appraised at the sum of \$42,152.03, but also its liabilities due 213 depositors, amounting to \$37,687.55, and unpaid drafts \$341.78, making a total of \$38,029.33 indebtedness on account of the Exchange Bank. It appears by the abstract of the evidence in the case, as well as by the admissions of counsel for the respondent before the court, that it was found impracticable on the death of Taylor Purl for the executor to carry on the private banking business as executor; accordingly a new bank with a capital of \$10,000 was organized and incorporated, Mrs. Inez Purl Carr becoming the owner of \$9000 of stock in the bank.

It further appears that on January 2, 1906, the executor presented a petition for order of sale, at private sale, of the personal property of the bank, "including assets, good will, safe, furniture, books and other personal property belonging to said bank." This was ap-

proved and order for sale entered same day. He also on the same day presented a petition for order of sale at private sale, of the personal property of the estate not pertaining to the bank. This was approved and sale ordered same day.

On January 15th the executor reported that he had sold the bank assets for \$34,918.30, to the "Exchange Bank of Jonesburg" (that being the name of the new corporation, the private bank having been known as "Exchange Bank of Jonesburg, Missouri"), for \$34-918.30. The report proceeds: "And the said Exchange Bank of Jonesburg, having complied with the terms of said sale and paid to me the said sum of \$34,918.30, the said property was sold, turned over and delivered to it, the said Exchange Bank of Jonesburg." This was approved by the probate court January 15, 1906, the executor being ordered to take proper receipts for the \$5000 from Mrs. Carr.

On January 16th the executor reported sale of property belonging to the estate outside of the bank to Inez Carr for \$551. This was approved on that date. On the same date the executor presented a petition "for order of partial distribution of the assets of said estate, to-wit: Inez Purl Carr, the only heir-at-law and only legatee of the said Taylor Purl, deceased, in the sum of \$5000." The petition was granted January 16th and the \$5000 ordered distributed and paid to Inez Purl Carr.

The discrepancy between the \$34,918.30, for which the assets are reported sold and \$42,152.03, the appraisal value of the bank assets, \$7233.73, is said by counsel to be covered by "cash and cash assets," which is probably correct, but there is no explanation of it in the record. No point is made on it however. It appears also by statement of counsel at bar, that the executor deposited the whole fund, \$42,152.03, in the new bank, checking out against it amounts due the depositors of the bank, it appearing that there were 213 checks for that number of depositors, and that he also took care of

or paid the outstanding drafts, six of them, amounting to \$341.78, thus turning over to the creditors of the bank \$38,029.33. Thus all of the assets of the bank, consisting of notes, checks, school warrants, currency, etc., appear to have passed through the hands of the executor, amounting, as before said, to \$42,152.03.

A summary of the first settlement, filed and approved December 28, 1906, shows the total amount of assets of the bank at the death of the deceased by the inventory to be \$42,152.03, due depositors, \$37,687.55. These depositors were reported paid in full in this first settlement. The recapitulation of the first settlement showing:

“By amount paid depositors,	
vouchers 1 to 213	\$37,687.55
By amount paid drafts, vouchers	
214 to 219	341.78
Total vouchers filed	\$38,029.33
Balance after paying depositors	
and drafts.....	4,122.70”

The above balance was carried forward as an additional charge to the inventory of the estate outside of the bank, and along with this settlement, covering the bank, and on the same date appears the first annual settlement of the estate, “on account of the personal estate of said deceased other than the private banking institution of said deceased, known as the Exchange Bank of Jonesburg, Mo., together with the balance of money remaining after the payment of all the liabilities of said Exchange Bank.

Gupton v. Carr.

"To amount of personal estate as shown by inventory	\$4,408.93
Balance in hands of executor after payment of liabilities of Ex- change bank	4,122.70
Total	8,531.63
Vouchers 1 to 20 inclusive and in- cluding probate court costs in various amounts therein in the sum of	\$6,385.02
By amount paid executor on ac- count of service	200.00
Balance in hands of executor.....	1,946.61

Total	\$8,531.63
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Recapitulation.

Amount of inventory and balance from Exchange Bank.....	\$8,531.63	
Vouchers filed		\$6,585.02
Balance		1,946.61

\$8,531.63	\$8,531.63"
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This settlement appears to have been duly verified.

Following the recapitulation as above is this: "December 28, 1906: W. L. Gupton, executor of the estate of Taylor Purl, deceased, presents first annual settlement of said estate. The items of expenditures are approved and allowed. Said settlement showing a balance due the estate in the sum of \$1,946.61 is approved and ordered filed and recorded." Whether this approval covers both settlements is not very clear. Nor is it clear whether these were treated as one settlement. We have stated the facts as they appear on the abstract, which is agreed to by counsel on each side as a complete and correct abstract. The executor exhibited his final settlement to the probate court of Montgomery county, on date not given, of which the abstract is as follows:

	Cr.	Dr.
"To am't due estate as per inventories filed		\$46,560.96
By am't paid out as proper credits in first annual settlement filed herein	\$44,614.35	\$44,614.35
<hr/>		
To am't balance due estate for this settlement		1,946.61
By am't 10 vouchers lumped herein down to and including Probate Court fees and docket fees \$	884.60	
By am't 5 per cent ex'r com. on \$45,426.42. \$	2,271.32	
To am't 5 per cent com. on sum \$4,000 .. \$	200.00	
<hr/>		
	\$41,426.42	\$2071.32 \$ 2,071.32 \$ 2,956.01'
<hr/>		
By am't bal. due ex'r to complete this settlement	\$	1,000.40''

It will be noted that in this final settlement, the executor claims commission of 5 per cent on \$49,426.42, that being claimed to be the value of the personal property and money of the estate, both in and outside of bank, which had come into his hands as executor. In due time the respondent, Mrs. Inez Carr, presented exceptions to this settlement, which as set out in the abstract are substantially as follows: That the personal estate of Taylor Purl, outside of the bank, was \$4408.93; that the net assets of the bank amounted to \$4122.70, so that the total personal estate amounted to \$8531.63; that \$792.76 of this is unavailable, and for which the executor is entitled to credit, leaving net \$7738.87, and that this amount is the amount for which disbursements

had been made and allowed according to law, and this is the amount on which it is admitted by exceptor that the executor is entitled to a commission of 5 per cent; that the bank was indebted to its depositors in the amount of \$37,687.55, and there were unpaid drafts outstanding amounting to \$341.78, total of \$38,029.32. That the executor asks credit of 5 per cent commission on \$37,687.75, amounting to \$1884.38, "and that this item of \$1884.38 is the item to which this exceptor excepts, and she says that this executor is not entitled to a commission of 5 per cent on such sum of \$37,687.55, being the amount the Exchange Bank owed to its depositors, for the reasons following: First and second, no claims of any of the depositors were ordered paid or allowed by the probate court. Third, the item of \$37,687.55 was never ordered paid by the probate court or allowed by that court as a demand against the estate of Taylor Purl, deceased. Fourth, the executor is only allowed a commission of five per cent on such claims for which disbursements have been made which have been allowed by the court according to law. Fifth, because the executor in paying the disbursements of the Exchange Bank without an order of the court, without the claims having been allowed as demands, did so without authority and at his own risk and is not entitled to any commissions on any such claims. Sixth, the act of the executor in paying the claims without an order of the court was unauthorized and done by the executor at his own risk and peril. Seventh, because under the laws of Missouri an executor is only allowed a commission on disbursements which have been ordered by the court on claims regularly allowed according to law, and the claims of these depositors were not allowed according to law. Eighth and finally, "because the probate court and executor were wholly without jurisdiction of the subject-matter in attempting to settle the affairs of the Exchange Bank, and the affairs of the Exchange

Bank should have been settled by the circuit court appointing a receiver thereof and turned the assets over to the executor, or all of the claims of the depositors should have been regularly allowed as demands against the estate as provided by law." The probate court found that the executor was entitled to charge a commission of 5 per cent on \$7738.87 only and made an order reforming the settlement accordingly. On appeal by the executor to the circuit court and a trial there *de novo*, the above facts were in evidence, the inventories, orders, settlements and so on being introduced. A paper which reads as follows was also offered and read in evidence by the executor.

"Know All Men by These Presents That we, Inez Carr, formerly Inez Purl, daughter of Taylor Purl, deceased, and Chas. Carr who are husband and wife, being the legal and sole and only heirs of said Taylor Purl, deceased, late of Jonesburg, Montgomery county, Missouri, do hereby authorize and empower W. L. Gupton, the executor of the estate of said deceased, to pay to the several depositors on demand by check or otherwise in writing, any and all funds such depositors may have in the private bank of said deceased known as the Exchange Bank of Jonesburg, he to take proper receipts and vouchers therefor, and we hereby bind ourselves to preserve him, the said W. L. Gupton, as such executor or individual, harmless from any loss in consequence thereof. This January 2, 1906.

"INEZ C. CARR,

"CHAS. CARR."

This, when offered, was objected to by counsel for respondent for the reason that the executor can only be allowed a commission of five per cent on claims for disbursements which have been made and allowed by the court in accordance with law. The objection was overruled and the paper read in evidence. An agreed statement also introduced practically covered the above

facts. At the conclusion of the trial, the court rendered judgment in favor of the exceptor, respondent here, and found that the executor was entitled to retain as his total commission "for acting as the executor of said estate, the sum of \$386.95 and no more;" and that there is a balance due by the executor to Inez Carr, sole heir and distributee, \$874.91. Judgment was accordingly rendered. The executor filed a motion for new trial, which was overruled and exceptions being duly saved and an appeal duly perfected, the case is before us on appeal by the executor.

REYNOLDS, P. J. (after stating the facts).—In the brief and argument of the learned counsel for the respondent, submitted to us when this case was heard at bar, those counsel have said that it is conceded "that the sole and only question for this court to determine is whether under the facts stated, the appellant is entitled to a commission of five per cent on the sum of \$37,687.55 which he paid unto the two hundred and thirteen depositors of the Exchange Bank of Jonesburg. Respondent however denies that the executor is entitled to any such commission on said sum, and her objections thereto may be summarized as follows:

"First. That the probate court had no jurisdiction to wind up the affairs of the Exchange Bank of Jonesburg; and, second, That if it did have jurisdiction, before the executor is entitled to a commission on demands paid, the creditor of the estate must have his demand duly allowed, adjudicated and classified by the probate court."

Counsel then argues, first, that on sections 1298 to 1303, Revised Statutes 1899 (the Banking Law), the probate court had no jurisdiction over the funds in the bank. As their second proposition, they argued that the executor is not entitled to any commissions on the bank funds paid out, because the demands against the bank, evidenced by the checks, were not presented to

and allowed by the probate court. These practically follow the exceptions lodged in the probate court.

Referring to the paper read in evidence and which we have copied in our statement, that is the agreement between Mrs. Carr and the executor, counsel, in this first brief and argument, say that it should not have been admitted because "foreign to the question of the right of the executor to retain a commission. Had respondent excepted to the credits claimed by the executor by reason of his having paid the depositors, the paper then would become relevant. But in this proceeding the paper throws no light upon the issues. At most it merely protected the executor by reason of paying the depositors; but it could convey no jurisdiction upon the probate court, if the court had none." We call attention to these arguments and solemn admissions of counsel for the respondent, lawyers learned in the law, in order to emphasize exactly what issues were before the probate court and the circuit court and brought to us, as those issues were defined by counsel themselves in their printed brief as well as by oral argument. For, having obtained leave to file a supplemental brief, with that before us, we are obliged to say that they now attempt a departure from the issues which they have so distinctly avowed were the issues in both of the courts of first instance. In this supplemental argument and brief, filed with us after submission of the case, counsel for respondent for the first time advance this position: That "where an executor voluntarily, before final settlement, pays a legatee or creditor more money than would be due such legatee or creditor on final settlement, the loss must fall on the executor," and in support of this position it is said that in reviewing this settlement, this court will determine the issue as though it was sitting as a probate court, and that the record shows that the executor voluntarily paid this legatee five thousand dollars; that when he made his annual settlement there was a balance in his hands amounting

to \$1946.61; that he made no claims for commissions on amounts paid depositors in his annual settlement, but in his final settlement he claims a balance due him from Mrs. Carr to complete his settlement, of \$1000.40, and it is submitted that the probate court has no jurisdiction to render any judgment against the exceptor, Mrs. Carr, compelling her to pay back this \$1000.40, or any other sum to the executor. In effect, that it was a voluntary payment by the executor, which counsel assert the court has no power to compel the legatee to refund.

Before entering upon a discussion of the case arising upon the exceptions, we will dispose of all the above by remarking that it is not within the exceptions, which, in a case of this character and class, may be called the petition which states the cause of action. No such issue was before either of the courts of first instance, and this court is not one of original jurisdiction, in cases of this class, and can and will determine only such issues as were before the trial courts. We have no power, even if we had the disposition, which we have not, to go outside of those issues and give any consideration whatever to this so manifest afterthought.

Returning now to the case as presented by the exceptions and taking up the first objection, which rests on the proposition that the probate court had no jurisdiction to administer on \$37,657.55, the amount of the assets in the bank, which were due to the depositors or creditors of the bank, but could only administer on what remained of the bank assets after payment of these claims, we hold that the objection is not tenable. The death of Mr. Purl occurring in 1905, and the administration of his estate falling in between then and December 28, 1906, the banking law as in force prior to January 15, 1909, when the new law of March 18, 1907, took effect (Laws 1907, pp. 124, 150), is to be applied. Our statute, chapter 12, of article 8, Revised Statutes 1899, referring to it as in force before the adoption of the new chapter in 1907,

provides for the regulation of banks, section 1299 being amended by Act of March 24, 1903. Section 1301 applied all the provisions of the article to private bankers, the latter section distinctly providing that the provisions of the article shall apply to the private banker, "so far as the same are applicable." Section 1304, before the law of 1907, gave the Secretary of State visitorial right of examination, and section 1305 provided for the winding up of the affairs of a bank when the conditions set out in that section occur.

In *Clifford Banking Co. v. Donovan Com. Co.*, 195 Mo. 262, 94 S. W. 527, our Supreme Court held that this section 1305 had no application whatever to the settlement of the affairs of a banking corporation which is solvent at the time its existence terminates by the limitation of its charter. In this *Clifford Banking Company* case, the charter had expired and the affairs of the bank were taken in charge by the members of the last board of directors of the concern as trustees, they being such under the general statute relating to the winding up of corporations whose charters have expired by the last board of directors, they acting in liquidation as trustees.

In the later case of *State ex rel. Hadley, Attorney-General, v. People's United States Bank*, 197 Mo. 574, 94 S. W. 953, it is reiterated that the Secretary of State has no power to take upon himself the administration of the affairs of a bank, organized under the laws of the state, save in case of insolvency, as insolvency is defined by statute. True, both of these cases were incorporated banks, but this section here construed is the only law giving any authority to the Secretary of State to proceed against any bank.

The evidence in this case shows, beyond room for cavil, that the private bank, known as the Exchange Bank, owned by Mr. Purl, was at the date of his death and taking over of the assets thereof by the executor of his will, entirely solvent.

The limitation of the law as construed in the two cases above cited disposes of the claim of any right in the Secretary of State to have gone into the circuit court, as it is argued he should have done, and applied for the appointment of a receiver, even if this Exchange Bank had been a corporation. Much less is there any such right when the institution, instead of being a corporation, is a private bank, owned by one individual, a banker sole. We cannot assent to the proposition advanced by counsel that a private bank, carried on by an individual, is *quasi* a corporation. The law, in subjecting the business of banking, when carried on by an individual, to state supervision, merely recognizes it as impressed with a public character, recognizes it as a business in which the public has an interest. In like manner and by like reasoning and for like cause, an individual engaged in operating a grain elevator for hire is recognized as engaged in a public employment, devoting his property to a public use and thereby subjecting himself to the control of the state. *Munn v. Illinois*, 94 U. S. 113, and kindred cases, *inter alia*, *Merchants' Exchange of St. Louis v. Knott*, 212 Mo. 616, 1. c. 643, 111 S. W. 565, affords illustration of the application of this rule and uphold the application of the former. It might be sufficient to dispose of this proposition by saying that the case of a private banker—sole—dying, is not a case within the letter of the law, but we go further and hold that the individual banker solvent at the date of his death, sole owner of all the assets of the bank, is not within the spirit of the provisions of our state banking law, so as to warrant the Secretary of State to step in, and by the hands of a receiver, appointed by the circuit court, take upon himself the administration of the affairs of the individual banker. That is practically what respondent contends should have been done in this case. Moreover, if this is the effect of the banking law it has engrafted a marked exception upon our probate laws. By the lat-

ter, when the individual dies his whole personal estate certainly, often his real estate, passes so completely within the jurisdiction and exclusive power of the probate court of his county for the purpose of settlement and distribution, that the heir can take over the personalty only through the administrator or executor. But if counsel are right in their contention, if the estate of the decedent happens to be entirely in his bank, the probate court has no jurisdiction over it; the decedent could not even direct its disposition by will. If the legislators of the state had intended to make such a radical departure from our probate laws as would be involved by any such rule, they certainly would have said so in plain and unmistakable language. They have not done it even by indirection. We hold that under the law as then in force, the jurisdiction of all matters pertaining to the winding up of the estate of Taylor Purl, the taking over of all the assets thereof, was exclusively and entirely in the probate court of Montgomery county. Learned counsel for the exceptor argue against this with great force, however, going even further and earnestly contending that it was the duty, no less than within the power of the Secretary of State, on the death of Mr. Purl to have stepped in and taken over the affairs of the bank; that section 1305, in terms, provides that "whenever it shall appear to the Secretary of State that it is unsafe or *inexpedient* (italics those of counsel) for any such corporation to continue to transact business, . . . or that its continuance in business will seriously jeopardize the safety of its depositors," that it is his duty to do so. Without resting on the proposition that in the cases above referred to, our Supreme Court has held that this power rests in the Secretary of State only in cases of insolvency, it is a sufficient answer to the contention to say that as this section rests action so entirely within the discretion of the Secretary, it is certain that in the case of this banker's decease, the Secretary has not seen fit to

step in and take possession. It is fair to presume that he knew of the death of Mr. Purl, for it is in the case that he issued a certificate to the corporation organized for the very purpose of taking over the business of this bank. The result in this case is a complete justification for the non-action of the Secretary, for every depositor and creditor of the bank was paid off in full, at a minimum of cost, delay and trouble.

It is argued that the depositors had some special lien on these funds; that more than the relation of debtor and creditor existed between them and the bank. This is a mistake. These depositors were general creditors of the bank, even regarding the bank as something outside the estate of its sole owner; were not preferred or special creditors. [Kenneth Investment Co. v. Nat'l Bk. of the Republic, 96 Mo. App. 125, l. c. 144, 70 S. W. 173; Arnold v. Sedalia Nat'l Bank, 100 Mo. App. 474, l. c. 478, 74 S. W. 1038; O'Grady v. Stotts City Bank, 106 Mo. App. 366, l. c. 369, 80 S. W. 696; State v. Reid, 125 Mo. 43, l. c. 51, 28 S. W. 172.]

It is further argued that this money in the bank did not belong to the bank but to the depositors. This is more specious than sound. It was money held and of the estate of the decedent, and the fact that he owed it to some one else in no manner whatever took it out of his estate. His executor and no one else was the only person who was entitled to take possession of it and distribute it to the claimants, creditors of the bank, and when he took it into his hands as he did, it was just as much of the personal property and money of the estate as any of the so-called individual assets of the decedent. The case of Hitchcock v. Mosher, 106 Mo. 578, 17 S. W. 638, is cited and relied upon by counsel for each side. In that case the deceased had bought bonds through a broker, paying 10 per cent on their value, and after he died the broker, buying in the bonds, turned back to the administrator the 10 per cent the deceased had in them, the other 90 per cent belonging

to the broker and in no sense whatever were of the assets of the estate of the decedent. All the right or interest of decedent in the bonds was in ten per cent of their value. That case has no parallel whatever in its facts to the case at bar.

Counsel urge as a final argument against throwing the bank assets into the probate court, that the winding up of an estate in that court involves a delay of two years in the payment of depositors. It did not in this case, but even if it had, the delay of two years is one imposed by the law, and the argument of delay is not one that appeals to us; it is for the Legislature.

The second proposition as to right to the commission claimed, is somewhat more difficult of solution. That the assets of Taylor Purl in the bank were just as much of the assets of his estate as any other personal property he possessed, admits of no question. It might as well be claimed that there were two estates and that there should be two administrations or settlements of the estate of a merchant engaged in carrying on the business of a grocer, if at the same time he happens to be running a farm or doing any outside business in which his capital or labor is employed. The law commands that the executor taken into his hands all the personal estate of the testator, so that it is not alone his right but his duty so to do. There is provision in the law for but one administration of an estate, whether by the original executor or administrator or by one *de bonis non*. The separation of accounts which seems to have been carried on here, while possibly not improper, did not have the effect of dividing the estate of the decedent or its administration into two parts; making an inventory of one branch and a separate inventory of another, could not have the effect, in law, of dividing the decedent's estate into two parts or branches. It was as much the duty of this executor to collect and preserve the estate of the decedent invested in the banking business, as it was to collect that outside of the

bank. The executor here did this, and the total personalty collected—allowing for unavailable assets, was \$49,426.42; of this amount all but about \$4000 came to him of the assets of the bank; he paid out to the creditors of the bank the \$37,681.55, turning over to the exceptor all the balance, less allowed costs, credits and commissions; in fact he seems to have distributed to the exceptor, sole heir and legatee, about \$1000 more than, on this showing, and if he is allowed commissions claimed thereon, she was entitled to receive. That he has made the disbursements claimed is not disputed. That he was authorized by the exceptor and her husband, sole distributees, to pay out the \$37,687.55, to the bank creditors, is not disputed. That the probate court did not allow the demands of those bank creditors is not disputed, although it is admitted that the executor reported this disbursement of \$37,687.50 in his first annual settlement and exhibited vouchers for it and that the probate court passed and approved that settlement. What then is the law as applies to these facts, as to allowance of commission to the executor for this \$37,657.55 disbursement? The statute, section 223, Revised Statutes of 1899, provides: "In all settlements of executors or administrators the court shall settle the same according to law, allow all disbursements and appropriations made by order of the court (as also for), legal advice and services, and collecting and preserving the estate, and as full compensation for their services and trouble a commission of five per cent on personal property and on money arising from the sale of real estate." Then follows section 224: "Upon every settlement, the executor or administrator shall show that every claim for which disbursements have been made has been allowed by the court according to law." It is over these two sections that this branch of the controversy turns. Prior to 1889, this section 224 read: "Upon every settlement the executor or administrator shall show that every claim for which disbursements

have been made has been allowed by the court according to law, *or shall produce such proof of the demand as would enable the claimant to recover in a suit at law.*" [R. S. 1879, sec. 230.] Many cases, of which *Jacobs v. Jacobs*, 99 Mo. 427, 12 S. W. 457, and *McPike v. McPike*, 111 Mo. 216, 20 S. W. 12, are types, which arose under this section as it stood in the statutes of 1879, have held that independent of the allowance by the probate court of the demand, it was open to the executor or administrator to produce proof on final settlement that the demand paid by him, although not formally allowed by the probate court, was of such a nature that it could be proved and established by the claimant if he instituted an action at law against the estate, and it was held that when the executor or administrator showed that disbursements made by him but not previously allowed as claims by the probate court were of such a character that they could be established at law, he was entitled to credit for them and to his commission on them. But in the revision of the statutes of 1889, the words which we have italicized were eliminated and ever since the revision of 1889, the section has stood as it now appears and as we have before quoted it, as section 224, Revised Statutes 1899. It was at one time contended that the omission of these italicized words from the revision of 1889 was not justified by law; that no act of the Legislature had amended section 230 of the revision of 1879. This question, however, was put at rest by the Supreme Court in a decision by Judge VALLIANT in *Langston v. Canterbury*, 173 Mo. 122 (73 S. W. 151) where at page 130, he says that without questioning the authenticity of the revisions of 1889 and 1899, an examination of the files in the office of the Secretary of State shows the passage and approval of an act revising the chapter on administration as found in the revision of 1879, and which act shows that section 230 of the revision of 1879 was amended in the particular above indicated and as ap-

pears in the revisions of 1889 as section 223, and as section 224 in the revision of 1899. In this same case of *Langston v. Canterbury*, *supra*, it is held that under the law as it now exists, claims must be exhibited to the administrator, presented to the probate court for allowance and established by proof, and that until a claim has been so allowed by the probate court or established by judgment of the circuit or other court of competent jurisdiction and classified by the probate court, the administrator has no right to appropriate any of the assets of the estate in its payment, and inferentially, that he could not claim commissions on that much of the estate so not properly administered.

In *Springfield Grocer Co. v. Walton*, 95 Mo. App. 526, 69 S. W. 477, Judge BARCLAY, speaking for this court and after having with his usual care and particularity pointed out the change affected in section 230, Revised Statutes 1879, by the revision of 1899, holds (page 536) that so far as concerns the commissions due to the administrator, the trial court had limited them to his percentage upon disbursements which the court finally approved. Those which were not approved were held not entitled to be estimated in arriving at the administrator's charges, and Judge BARCLAY says that the trial court was correct in so holding. On the authority of these decisions it is claimed that the appellant here is not entitled to any commissions on these disbursements which he made on checks drawn against him, although the checks were presented by him in the probate court as vouchers to his first settlement, and show the expenditure of the \$37,687.55. This first settlement was approved with this disbursement shown in it and with the vouchers showing its expenditure before the court, and under the law as it stood prior to the revision of 1889, upon the executor showing that these vouchers were correct and lawful charges against the estate which could have been established in an ac-

tion at law, he would have been allowed credit for the disbursement and of course his commissions thereon.

We have no statute limiting the commission of the executor or administrator to his disbursements on allowed claims, or measuring his allowances by his approved disbursements. Section 223, Revised Statutes 1899, is the only section covering commissions, and section 224, is the only section ever construed in connection with it when the matter of commissions is under consideration.

Recurring to the case of *Springfield Grocer Co. v. Walton*, *supra*, it is to be observed that there is no discussion by Judge BARCLAY of the proposition which he there announces, that the trial court properly limited the allowance of commissions to the administrator to a percentage upon his disbursements which the court had finally approved. Obviously what was in the mind of the court was the general doctrine that an administrator or executor, like any trustee, is only entitled to commissions or reward when he has faithfully and according to his trust or the law administered the estate. It is true there are dicta in one or two cases to the effect that the administrator shall receive his commission on the assets belonging to the decedent which came into his hands and were properly paid away or disbursed by him in the course of his administration, as see *Hitchcock v. Mosher*, 106 Mo. 578, l. c. 582, 17 S. W. 638. In *Ladd v. Stephens*, 147 Mo. 319, l. c. 335, 48 S. W. 915, it is said that "administrators are entitled to commissions on the actual value of the assets distributed by them," citing *Glover v. Holliday*, 109 Mo. 108, 18 S. W. 1133, and *Hitchcock v. Mosher*, *supra*. But there is no statutory provision which confines the commissions to the amount of the estate disbursed on allowed accounts. To hold that such was the law would entirely defeat an administrator or executor from any commission, if it so happened that there were no claims whatever against an estate and that the personal prop-

erty was distributed among the heirs without a sale. When we search for the underlying reason for refusing allowances of commissions on unallowed disbursements, it is not difficult to find. It rests on the broad rule that an unfaithful trustee shall not reap any reward springing out of his breach of trust, more particularly on the common sense proposition that an administrator shall not be allowed his commission on that part of the assets of the estate which he has paid out without authority of law or for which he has failed to account. He has committed a breach of trust and therefore is not entitled to commissions.

In brief, the executor or administrator is entitled to his commissions on all the personal property of the estate which came into his hands and for which, without default and in accordance with the law, he has accounted. This is so, not that the law itself makes any such provision, but because the courts, looking to the spirit of the law and having the estates of the dead under their care, will not allow him who has been guilty of maladministration to reap any reward therefrom.

Applying this rule to the facts in the case at bar, there is no suggestion whatever of any breach of trust or malversation on the part of this executor. On the contrary, it is admitted that his disbursements are all correct. It is admitted that he paid out the money to those creditors of the bank who were entitled to it. It is in the record that he made these payments under and in accordance with the agreement between him and Mrs. Carr, and her husband, the sole legatees and distributees of the estate, who moreover agreed to hold him harmless by reason of making the disbursement. It is also admitted that he paid out this amount to these creditors without requiring the creditors, depositors in the bank, to present their claims in the probate court for allowance. The exceptor does not seek to charge him with this disbursement. What she does do is to challenge his right to a commission on this dis-

bursement. Admitting that it was unlawful on the part of the executor, as such to have made these disbursements without the previous authorization of the probate court, does it lie in the mouth of Mrs. Carr, this exceptor, who is the sole party in interest and the only one complaining of the act of this executor, to do this; to challenge the right of the executor to lawful commissions on these disbursements? We think not. While the disbursement was not authorized by any order of the court, it involved neither a breach of trust or of duty upon the part of the executor, nor did it involve a misappropriation of the funds or any loss to the estate. The executor has faithfully accounted for every dollar of the assets of the estate that came into his hands. This exceptor is estopped by her own agreement from asserting the contrary.

This court, in *Newton v. Rebenack*, 90 Mo. App. 650, held that where a *cestui que trust*, who is *sui juris*, has authorized her trustee to pursue a certain line of conduct, she will be precluded from maintaining an action against the trustee for breaches which he had committed and which breaches were induced by her direction and assent. It is true that this rule is one usually applied between a trustee and his *cestui que trust*, but we know of no reason why under the facts in this case, it does not apply as between this exceptor and the executor. Without invoking the rule existing between trustee and *cestui que trust* as entirely applicable to the relation of executor and distributee, there is sufficient analogy to those relations to make that rule apply here.

It is true that the agreement between Mrs. Carr and the executor makes no provision as to commissions, nor does it in terms say that the claims of depositors are not to be presented to the court for allowance. But who can doubt that but for the agreement this executor would have compelled all the depositors in the bank to have presented their claims to the probate court for

allowance. If that had been done, it is tacitly admitted that the claims would have been allowed and the executor, beyond all question, would have been entitled to his commission on them. It may be said that a persuasive inducement for this agreement may be found to rest in the item of cost saved the estate by avoiding the cost of having the claims allowed by the court to each individual claimant. Be that as it may, this executor, having at the instance and with the assent of the exceptor made these payments, this exceptor is estopped from now claiming that he is not entitled to the commission allowed by law on all the money and personal assets of the estate which came into his hands as executor, for it is clear that he has faithfully administered upon all of them. We do not put our conclusion on the ground that because these claims of the bank creditors were claims which could or might be established by an action at law, the executor is protected in payment thereof and entitled to commission thereon. The ground for any such conclusion fell, when section 224 was amended as in its present form by the revision of 1889. We place our conclusion on the distinct ground that the executor has faithfully administered all of the estate, and having made the disbursement here under consideration without previous allowance of the demands by the probate court, but in consequence of and in execution of the agreement between him and the exceptor, there has not only been no maladministration, but the exceptor is estopped from claiming it as an unlawful disbursement; and being a lawful disbursement as against this exceptor, she is estopped from denying to the executor the commission the law allows on the assets of the estate which passed through his hands and were in his charge, and all of which he has faithfully administered.

The judgment of the circuit court of Montgomery county is reversed and the cause remanded with direc-

tions to that court to overrule the exceptions to the final report of the executor, and further proceed according to law and as here pointed out. All concur.

STATE OF MISSOURI, Respondent, v. S. M.
McANALLY, Appellant.

St. Louis Court of Appeals, February 1, 1910.

1. **CONSTITUTIONAL LAW: Crimes and Punishments: Jurisdiction: Construction of Constitution not Involved, When.** In a criminal prosecution, although the defendant invokes a provision of the Constitution of the State, such invocation does not involve a construction of the Constitution, where the statutes concerning the matter govern it so completely that it is not necessary to resort to a construction of the Constitution to determine it.
2. **CRIMES AND PUNISHMENTS: Criminal Practice: Right of Trial by Jury.** Section 2609, Revised Statutes 1899, which provides the defendant and prosecuting attorney, with the assent of the court, may submit the trial of a misdemeanor to the court, requires positive, affirmative action on the part of the defendant to dispense with a jury, and in the absence of such assent, the court is without power to try the case without a jury.
3. **LOCAL OPTION: Local Option Law and Druggists' Law May Co-exist in Same Territory.** The Local Option Law and the law regulating druggists and pharmacists may co-exist in the same territory, and hence the adoption of the local option law would not abrogate the law relating to druggists.

Appeal from Bollinger Circuit Court.—*Hon. Benj. H. Marbury*, Special Judge.

REVERSED AND REMANDED.

Hensley & Revelle and *W. M. Morgan* for appellant.

Monroe Robbins and *W. K. Chandler* for respondent.

STATEMENT.—An indictment was returned against the defendant for that, being a druggist and the proprietor of a drugstore and a pharmacist in Bollinger county, he had willfully and unlawfully sold and disposed of intoxicating liquor in less quantities than four gallons, as charged in the first count, and in the second count, that he had willfully and unlawfully suffered and permitted intoxicating liquors to be drunk at and about his place of business in the county.

The regular judge of the circuit court being disqualified, a special judge was chosen and elected to try the case and after his election an application for change of venue from the county, on account of the prejudice of the inhabitants thereof was made, witnesses heard on behalf of the State and of the defendant, and the application overruled. Motion to quash for alleged defects in the indictment was filed and overruled and defendant having plead not guilty, the court called the case for trial. Whereupon the prosecuting attorney announced ready, but the attorney for defendant refused to announce because he claimed that the court had no jurisdiction over the cause. The court refusing to accede to this suggestion, asked the prosecuting attorney how he intended to try the case. The prosecuting attorney announced that he would try it by the court, and the defendant's counsel being asked how they would try the case, announced that believing that the "Honorable B. H. Marbury has no jurisdiction or authority in any manner to hear, determine or try the issues involved between plaintiff and defendant and refusing to in any manner waive his rights guaranteed him by section 22, article 2, of the Bill of Rights of the Constitution of Missouri, refuses to make any announcement as to how he will try this case, or any other announcement." Again asking the prosecuting attorney if he was ready and how he would try the case, on the prosecuting attorney saying that he was ready and would try it by the court, the court directed the trial to pro-

ceed, to which defendant duly objected and excepted. The court thereupon proceeded to try the case without a jury, and at the conclusion of the trial found the defendant guilty on both counts of the indictment and entered up judgment and sentence accordingly. From this the defendant has duly appealed.

REYNOLDS, P. J. (after stating the facts).—While it is true that the defendant invoked the provisions of the Constitution of the State, securing a right of trial by jury and guaranteeing due process of law, the determination of which would involve the construction of the Constitution, we do not think that this is a case involving the construction of the Constitution of the State. The statutes concerning practice in criminal cases governs this matter so completely, that it is unnecessary to resort to constitutional construction to determine it. Section 2608, Revised Statutes 1899, provides: "All issues of fact in any criminal cause shall be tried by a jury, to be selected, summoned and returned in a manner prescribed by law." Section 2609, however, provides: "But the defendant and prosecuting attorney, with the assent of the court, may submit the trial of misdemeanors to the court, whose finding in all such offenses shall have the force and effect of a verdict of the jury." This section requires positive, affirmative action on the part of the defendant to dispense with a jury. That was not done in this case and in the absence of such assent the court was without power to try the case without a jury. The appeal of the defendant to the constitutional provisions was, in effect, a demand for a jury. Even without that appeal, if the defendant had stood mute and made no demand for a jury, it was the duty of the trial court, under the law, to have ordered one and to have tried the case with the aid of a jury. For this reason the verdict and judgment of the trial court will have to be set aside. We see no other error in the record of the case, which is

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submitted to us without either assignment of error or joinder in error and without the aid of briefs or argument of counsel

The point is made against the indictment, that as the local option law had been adopted in Bollinger county prior to the alleged commission of the offenses charged, that the law regulating druggists had been abrogated. It has been decided by our courts, both Supreme and Appellate, that the Local Option Law and the law regulating druggists and pharmacists may co-exist in the same territory. [See *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *State v. Moore*, 107 Mo. 78, 16 S. W. 937; *State v. Williams*, 38 Mo. App. 37; *State v. Bevans*, 52 Mo. App. 130.]

Judgment in the case is reversed and the cause remanded. All concur.

STATE ex rel. CLAY BLACK, Respondent, v. LAURA E. BARTLETT, Appellant.

St. Louis Court of Appeals, February 1, 1910.

1. MUNICIPAL CORPORATIONS: Action to Collect Taxes: Parties. An action by a city of the fourth class to collect taxes is not one strictly *in rem*, hence the owner is a necessary party.
2. ———: Pleading: Judgment Must Conform to. In a suit by a city of the fourth class to recover unpaid taxes, it was error to render judgment for the taxes for a year not covered by the petition.
3. ———: Action to Collect Taxes: Necessity of Proving Ownership: Evidence: Taxbills. In a proceeding by a city of the fourth class to recover judgment for unpaid taxes and to enforce it as a special lien against the property, it is necessary that at least a *prima facie* case of ownership of record or otherwise be made out, and the fact of ownership is not established by the taxbill alone.

Appeal from Scotland Circuit Court.—*Hon. Chas. D. Stewart*, Judge.

REVERSED.

E. R. Bartlett for appellant.

Luther & Gundy for respondent.

REYNOLDS, P. J.—This is a suit by the collector of the city of Memphis, Scotland county, to recover judgment and enforce it as a special lien against lots in the city of Memphis alleged to be the property of the defendant, it being claimed that she is delinquent in taxes due the city of Memphis for the years 1898, 1899, 1900 and 1901. In the original petition filed in the suit, it was charged that the defendant was also delinquent for the taxes of 1902, but on demurrer sustained to that and an amended petition being filed, the taxes alleged to be due for 1902 were omitted. The only evidence introduced in the case was what is called a back taxbill, which appears to have been originally made out in favor of the city of Memphis and against one James B. Dodge, and then altered by writing in the name of the defendant, Laura E. Bartlett. The court entered judgment against the defendant for the taxes for 1898, 1899, 1900, 1901 and 1902, declaring them a lien on the lots described. Defendant appealed.

The answer was a specific denial of all the allegations of the petition, denying ownership of the property as well as the right of the relator to sue. The fact of ownership was therefore distinctly in issue.

Memphis is a city of the fourth class. Section 5942, of the Revised Statutes, vests the power to collect city taxes of a city of that class in the city collector, "in the same manner and under the same rules and regulations as are or may be provided by law for the collection and the enforcement of the payment of state and county

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taxes." Section 9303 makes the taxbill "prima facie evidence that the amount claimed in the suit is just and correct." The same section requires the action to be against the owner of the property. [Jaicks v. Sullivan, 128 Mo. 177, 1. c. 183, 30 S. W. 890; Schnitger v. Rankin, 192 Mo. 35, 91 S. W. 122.] This is obviously correct, for in the Jaicks case, *supra*, as in many other cases, our courts have held this not to be a proceeding strictly *in rem*; hence the owner is a necessary party, and at least a prima facie case of ownership of record or otherwise must be made out. The fact of ownership is not established by the taxbill alone. In the case at bar, beyond the introduction of the taxbill, there was no proof of ownership whatever. Moreover, the judgment is for taxes of 1902, which are not covered by the petition. The demurrer interposed by the defendant at the close of the testimony—more correctly her motion for judgment on the pleadings and evidence, should have been given.

The judgment of the circuit court is reversed. All concur.

S. S. BARNES, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals. Submitted on Briefs February 10, 1910.
Opinion Filed February 21, 1910.

RAILROADS: Negligence: Fires: Vanderburgh v. Railroad Followed. The facts in this case being identical with those examined in Vanderburgh v. Railroad, 146 Mo. App. 609, on the authority of that case, the judgment in this one is affirmed.

Appeal from Dunklin Circuit Court.—*Hon. J. L. Fort*,
Judge,

AFFIRMED.

W. F. Evans, Moses Whybark and A. P. Stewart for appellant.

E. F. Sharp, Russell & Deal for respondent.

REYNOLDS, P. J.—Action for damages for the destruction of a frame and sheet-iron building containing machinery used in ginning cotton, situated at Marston, New Madrid county, alleged to have been damaged and destroyed by fire communicated by sparks from an engine or engines in use upon the railroad of and operated by the defendant company, the value of the property being placed at \$7526.75.

The answer was a general denial.

On the trial before the court and jury, plaintiff's damages were assessed at the sum of three thousand dollars, and judgment followed. After an unsuccessful motion for a new trial and in arrest, the defendant duly perfected an appeal to this court, having saved exceptions to the adverse rulings of the trial court.

The fire which caused the loss in this case is the same one that was under review in the case of Vanderburgh against this same defendant, decided January 18, 1910, reported 146 Mo. App. 609, it having originated in the cotton gin of this plaintiff and spread from that to the Vanderburgh property, the property in the Vanderburgh case consisting of an iron-hoop mill building, machinery, etc., which was adjacent to the cotton gin, the destruction of which latter is involved in this present suit. The evidence in this case is practically the same as in the Vanderburgh Case, the instructions are practically along the same lines as in that case, and the assignments of error are practically identical in the one case as in the other. As the facts attendant upon the origin of the fire and the liability of defendant were all examined in the Vanderburgh case, it being there held that they were sufficient to carry the case to the jury and to sustain the verdict, it is unnecessary to go

over them any further. We refer to the Vanderburgh case. On the authority of the decision in that case, the judgment of the circuit court in the case at bar is affirmed. All concur.

L. A. MISSEY, Appellant, v. SUPREME LODGE KNIGHTS AND LADIES OF HONOR, Respondent.

St. Louis Court of Appeals, February 21, 1910.

1. **Fraternal Beneficiary Associations: Particular Manner of Carrying on Work not Material.** The particular manner in which a fraternal beneficiary organization carries on the details of its work and government are not under the scrutiny nor subject to the criticism of the courts, so long as it appears its operations are carried on in good faith, in accordance with the statute relating to benevolent societies.
2. ———: ———: **Effect of Appointing, Instead of Electing, Officers.** The fact that some members of the governing body of a fraternal beneficiary association are appointed and not elected does not subject the association to the charge that its affairs are not conducted by a representative body, so as to make it subject to the general insurance laws of the State.
3. ———: **Evidence Held Sufficient to Show Defendant Conducted Business as Beneficiary Association.** Evidence held to warrant a finding that defendant was an organization carrying on business under the benevolent or mutual benefit plan, so as not to be subject to the general insurance laws of the State.
4. ———: ———: **Evidence: Certificate to do Business Prima-Facie Evidence.** A certificate of a fraternal beneficiary association to do business in this State is prima facie proof that it had the necessary requirements of such an association.
5. ———: **Foreign Company Licensed in this State: Powers of.** A foreign life insurance company authorized by the Superintendent of the Insurance Department to do business in this State as a fraternal beneficiary association cannot issue certificates of membership, or make contracts of insurance, on any other plan.
6. ———: **Beneficiary not Related to Insured: Policy Provisions.** Where the constitution and by-laws of a fraternal beneficiary association require the beneficiary to sustain a certain relation-

ship to insured, and provide that every certificate issued to a member who shall have designated in his application as beneficiary a person who is not entitled to take such benefit shall be void, a certificate designating, in pursuance of the application, the beneficiary as "cousin, first degree" of insured, when not related to him in any degree, is void.

Appeal from Jefferson Circuit Court.—*Hon. Joseph J. Williams*, Judge.

AFFIRMED.

W. P. Crites, Byrns & Bean and *Louis A. Steber* for appellant.

(1) The statute provides, *inter alia*, that a fraternal beneficiary association must have a "representative form of government." Sec. 1408, R. S. 1899; *Westerman v. Knights of Pythias*, 196 Mo. 670; *Gruwell v. National Council*, etc., 126 Mo. App. 496; *Brasfield v. Modern Woodmen*, 88 Mo. App. 208; *Supreme Lodge v. Simmering*, 88 Md. 276. In order that the society shall have a representative form of government as required by the statute, the general control of the affairs of the society must be in the hands of directors elected by the membership. *State v. Bankers Union*, etc., 71 Neb. 622; *Lange v. Royal Highlanders*, 75 Neb. 188. The law creates the corporation, prescribes its membership, etc., and when "the statute law creating it is silent, as to what shall constitute a legal assembly, the common law, both in England and in this country is well settled, that the majority of the members elect shall constitute the legal body." *Heiskell v. Mayor*, etc., 65 Md. 125. (2) If "the policy in controversy is not to be treated as a death benefit certificate issued by a fraternal beneficiary association, it should be classed as one issued by an" insurance company "and thus brought within the operation of the statute" relating to life insurance companies. *Kroge v. Modern Brotherhood*, 126

Mo. App. 693. (3) It is the rule with us that one may, of his own free will in good faith, insure his life, paying the premiums therefor himself, for the benefit of another who has no insurable interest therein and the policy will be held valid." *Locher v. Kuchenmiester*, 120 Mo. App. 701; *Deal v. Hainley*, 116 S. W. 1. (4) If the society so changes its articles or by-laws, or so conducts its affairs, that it does not answer to the definition of a beneficial society, it is not exempt, as such, but must be treated as a life insurance company. *International, etc., Alliance v. State*, 86 Mo. 550. (5) The fact that the defendant society calls itself fraternal or that the Secretary of State or Superintendent of Insurance issued a statutory permission to do business as such, does not aid the defendant, or help to make it a fraternal beneficiary association, nor change its character or status as such. *Herzberg v. Brotherhood*, 110 Mo. App. 328; *Gruwell v. National Council, etc.*, 126 Mo. App. 496. (6) Where in construing the policy of a benefit society organized under the laws of a foreign State it is found that the laws of that State and this State are different, the Missouri statute controls. *Herzberg v. Brotherhood*, 110 Mo. App. 328. Though misrepresentations are willfully false and made with the fraudulent purpose of securing a policy, and but for them defendant would not have issued the policy, yet if they are matters, which did not contribute to the death of the insured the policy is validated by the terms of section 7890, Revised Statutes of Missouri 1899. *Ashford v. Ins. Co.*, 98 Mo. App. 505; *Kern v. Sup. Council, etc.*, 167 Mo. 471; *Herzberg v. Brotherhood*, 110 Mo. App. 328.

E. M. Dearing for respondent.

(1) Every presumption will be indulged to sustain the finding of the court below. *Currey v. Bank*, 100 Mo. App. 532. (2) It is the duty imposed by law

upon the trial judge to pass upon the weight of evidence, and the appellate court cannot do so; it is not its province to review a case on its merits where it is supported by any substantial evidence. *Everman v. Eggars*, 106 Mo. App. 732. Where there is evidence tending to sustain the trial court's finding of facts, the appellate court will not disturb that finding. *Dobbins v. Humphreys*, 171 Mo. 198; *Hunt v. Ancient Order of Pyramids*, 105 Mo. App. 41. The finding of a court, in a case tried without a jury, will not be reviewed by the appellate court when there is substantial evidence to support it. *Faunlage v. Nagle*, 105 Mo. App. 471.

(3) No one can become a beneficiary in a fraternal benefit society who does not belong to some one of the classes of persons named in the statute as a beneficiary. *Dennis v. Modern Brotherhood of America*, 119 Mo. App. 210. (4) Where the monthly assessments and dues are not unalterably fixed, and the liability incurred by the association is not fixed and unalterable, but the amount of assessments depends on stated conditions, and the amount to be paid in case of death of a member turns on the amount realized from assessments, the certificate is not a policy of insurance like one in an old-line company; and if the contract provides that all liability on the part of the association shall cease upon failure of the member to pay his dues or assessments, the non-forfeiture statute can have no application. *Westerman v. Knights of Pythias*, 196 Mo. 670.

REYNOLDS, P. J.—Action by one Letitia A. Missey on a benefit certificate issued to one Frank D. Arnold as a member of Dorothy Lodge 2424, of the Knights and Ladies of Honor. The certificate entitles Arnold "to all the rights and privileges of membership in the order of Knights and Ladies of Honor and to participate in the relief fund of the order to an amount not exceeding \$1000," this sum payable at his death "to his first cousin, L. A. Missey," who is the plaintiff in this

case. Arnold died, being in good standing in the order, and payment of the claim to plaintiff being refused, she brought this suit. It is provided by the constitution and laws of the order, that all benefits are payable to a member's wife, husband, children and children of deceased children, grandchildren, parents, brothers and sisters of the whole blood, brothers and sisters of the half blood, grandparents, nieces and nephews, cousins in the first degree, aunts, uncles, next of kin, who would be distributees of the personal estate of such member upon his death intestate. These constitute what are called the first class of those who may be designated as beneficiaries. Of the second class are persons who are dependent upon the member for maintenance, such as food, clothing, lodging or education, and it is provided that written evidence of the dependency within this last class must be furnished to the satisfaction of the supreme secretary before a relief fund certificate can be issued. In the application for membership which the deceased signed, he warranted the statements in his answers to the questions, and contracted that if any of them was untrue, he should forfeit the rights of himself or family or dependents to any of the benefits or privileges of the order, and he stated in his application, that he directed the payment of the benefit to "L. A. Missey, related to me as cousin. First degree."

The petition in the case charged that the defendant was an insurance company. The answer denied this and set up that it was a corporation duly incorporated under the laws of the State of Indiana, as a fraternal, benevolent beneficial association, order, or society, and as such authorized to do business in the State of Missouri, and it contested payment on the ground that the beneficiary named was not within any of the classes above specified as entitled to be designated as a beneficiary; it plead the provisions governing the classification of beneficiaries, as above, and also section 10, of law 4, of the constitution and by-laws of the order, which pro-

vides: "Every relief fund certificate issued to a member, who shall have designated in his application as beneficiary, a person who is not entitled to take such benefit under relief fund law 4, shall be null and void, and all rights of such person named as beneficiary shall be forfeited."

The case was tried before the court, a jury having been waived, and the plaintiff was asked in her cross-examination, what relation she was to deceased, to which she answered, "None whatever." She was asked if she was his cousin in any degree. She answered that she was not, in any degree, and in answer to the question as to whether she was dependent upon him for support, she answered that she was not dependent upon him, that the deceased, Frank D. Arnold, was a friend of their family but no relation or connection whatever. As stated, the claim of the plaintiff was that this defendant was not a representative beneficial organization, within the meaning of our law, but an old line insurance company. This issue was submitted to the court, who heard the testimony adduced in support of the contention of plaintiff and at the conclusion of it found in favor of the defendant and rendered judgment accordingly. From this the plaintiff has prosecuted her appeal.

To repeat, the contention of plaintiff is that our statute provides, *inter alia*, that a fraternal beneficial association must have a representative form of government, and that the true test as to whether defendant is a fraternal beneficial association is, "is it formed or organized and is it carried on for the sole benefit of its members and their beneficiaries and not for profit? Has it a lodge system, with a ritualistic form of work and a representative form of government?" Plaintiff's learned and industrious counsel base their contention for these propositions on the cases of *Westerman v. Supreme Lodge Knights of Pythias*, 196 Mo. 670, 94 S. W. 470; *Brasfield v. Modern Woodman*, 88 Mo. App. 208;

Gruwell v. National Council Knights and Ladies of Security, 126 Mo. App. 496, 104 S. W. 884; and they contend that in order that the society shall have a representative form of government, the general control of the affairs of the society must be in the hands of directors elected by the membership. Admitting these propositions to be correct in law and admitting that there does not appear to be any evidence that ritualistic form of work was carried on, still the evidence afforded by the constitution and by-laws of the order, and the testimony given by witnesses, as to the manner in which the affairs of defendant are conducted, are sufficient to show that the operations of the defendant were controlled by representation or a representative government, in the sense that the grand and supreme lodges were constituted either of direct representatives from the subordinate lodges or by past officers of the order, elected or appointed as provided by the constitution of the order. The particular manner in which an organization of this kind carries on details of its work and government are not under the scrutiny nor subject to the criticism of the courts, so long as it appears that the operations of the company are carried on in good faith, in accordance with the statute relating to benevolent societies. Nor does the fact that some members of the governing body are appointed and not elected, subject the body to the charge that its affairs are not conducted by a representative body. The by-laws and the constitution of the order were in evidence before the court; there was evidence showing how its business was carried on; among other evidence in the case was the certificate of authority to do business, granted to it by the insurance superintendent of this State, as a benevolent association or society, so that there was evidence on which the court was warranted in finding that the defendant was an organization carrying on business under the benevolent or mutual benefit plan, in which event, it is not subject to the general insurance laws of this State.

At the trial in the circuit court, no point was made as to whether the defendant had "a ritualistic form of work," the sole point made by the instruction asked and by contention during the trial was that it did not have "a representative form of government." We might refuse to now consider the point now made, that it had not proven that it had a ritualistic form of work. When the defendant introduced its certificate to do business in this State as a fraternal beneficiary association this was at least prima-facie proof that it had the necessary requirements of such an association. That it is carrying on business solely on the assessments plan and has a lodge system is clear. By no construction can it be held to be such an association as is amenable to our statutes governing insurance companies. The only form of insurance this defendant had power to carry on in this State by the certificate of the superintendent of the insurance department of the State, and the only form of insurance it could do under its charter and constitution was on the assessment plan. As we held in *Smoot v. Bankers Life Ass'n*, 138 Mo. App. 438, 120 S. W. 749, it could issue certificates of membership or contracts on no other plan. If it exceeded its powers and issued contracts outside of them, its members or their beneficiaries would be on very precarious ground when seeking to enforce them. By the constitution and by-laws of the order, no member could designate a beneficiary who did not fall within some one of the classes above referred to. Confessedly this plaintiff was not of either class and was not entitled to the benefits of the order.

The judgment of the circuit court is right and is affirmed. All concur.

W. D. JAMISON, Appellant, v. F. F. HARVEY et al.,
Respondents.

St. Louis Court of Appeals, February 21, 1910.

1. **JUDGMENTS: Form of: Law Directs Mode of Enforcement.** The law directs the force and mode of enforcement of a judgment and it is not material that the judgment itself should set out these matters.
2. **TAXES: Judgment for Taxes: In Rem. Sess. Laws 1872, p. 129, section 220,** provided that if the holder of a tax deed be defeated in an action against him to recover the land sold, the successful claimant shall be adjudged to pay such party, claiming under the tax deed, the full amount of all taxes paid by the purchaser, together with the amount of redemption money, "which judgment shall be a lien upon the real estate in controversy, and may be enforced by execution as in other cases of judgments and decrees." *Held*, that a judgment for taxes under said section in favor of the defeated purchaser was a judgment *in rem* and not *in personam*.
3. ———: ———: ———: **Mode of Enforcement.** A judgment *in rem* in favor of the purchaser of a tax title, for taxes, interest and penalty on vacation of the sale, cannot be enforced by action thereon, but only by special execution against the *res* so long as the judgment is alive.

Appeal from Lincoln Circuit Court.—*Hon. Jas. D. Barnett*, Judge.

AFFIRMED.

Chas. Martin for appellant.

(1) The defendants having availed themselves of the judgment as an adjudication and pleaded it as in full force and effect are estopped now from interposing any defense to its force and effect. A party is bound

by statements made in his own pleading. *Knoop v. Kelsey*, 102 Mo. 291; *Lilly v. Menke*, 143 Mo. 137; *Cousin v. Bowling*, 100 Mo. App. 459. (2) The judgment sued on is personal as well as a charge against the land. The statute of 1872 under which it was given, directs the character and extent of the judgment to be that the successful claimant shall be adjudged to pay to the tax title claimant the amount of all taxes, etc., and that such amount shall be a lien upon the land and enforced as other judgments and decrees of the court. This statute makes the contract between the parties and becomes a part of the judgment and the judgment must be constructed by it. *St. Charles v. Hackman*, 133 Mo. 442; *Equitable Society v. Clement*, 140 U. S. 526. It is not necessary for the judgment to recite a finding against the defendants and an order for them to pay; the judgment shows the amount due Jamison and the statute says by whom it shall be paid and how it may be collected. The manner in which a judgment shall be executed is prescribed by the statute and any erroneous direction or omission to direct does not affect the manner of the execution of the judgment. *Houck v. Cross*, 67 Mo. 251; *Pickering v. Templeton*, 2 Mo. App. 424; *State ex rel. v. Vogel*, 14 Mo. App. 187. A judgment is merely a record contract and its meaning and effect must be determined by the law under which it was rendered. *Smith v. Moore*, 53 Mo. App. 525; *Farley v. Common*, 43 Mo. App. 168; *Cook v. Full*, 111 Mo. 285; *Cathron v. Lafayette Co.*, 125 Mo. 67; *Evans v. Fisher*, 26 Mo. App. 541; *Conley v. McKeag*, 57 Mo. App. 415; *State ex rel. v. Bibb*, 77 Mo. App. 277.

Norton, Avery & Young for respondents.

The judgment sued on is a judgment *in rem*. *Allen v. McCabe*, 46 Mo. 144. A judgment *in rem* cannot be made the foundation of another action. *L. A. R.*, vol. 16, p. 236; 4 *Waites Actions and Defenses*, p. 188; *East-*

Jamison v. Harvey.

man v. Wadleigh, 20 Am. Rep. 696. The legal owners of the land were not personally liable for the taxes, and were not made personally liable by the judgment. When the purchaser at the tax sale was subrogated to the lien of the State, as was done in the suit of Harvey et al. v. Jamison, reimbursement could only be had by enforcing his lien. 27 Am. and Eng. Ency. Law, p. 991; 10 Kan. App. 635; 61 Neb. 635; Sipperd v. Edwards, 39 Ind. 165. The tax lien as such was merged in the judgment and ceased in the rendition of the judgment. 2 Black on Judgments, sec. 674.

STATEMENT.—On the 26th of September, 1892, Malinda Dameron, Floyd F. Harvey, Thomas Harvey, Mary M. Dameron, Sarah F. Dameron, Theresa E. Dameron, George S. Meyers and one James William Dameron, in an action in ejectment, brought by them against the present plaintiff and appellant here, William D. Jamison, recovered judgment for possession of certain real estate, but this present plaintiff, defendant in that action, having set up in his defense to the action, that he had become the purchaser of the land at a sale by the collector, had October 15, 1874, under special execution for delinquent taxes for the years 1872 and 1873, and that by reason of said purchase he had paid out an amount for taxes, including interest, costs, penalties and subsequent taxes up to and including the year 1890, equal to \$305.82, the court, in addition to finding that all of the plaintiffs in that suit, except Malinda Dameron, were entitled to the possession of the land sued for, and ordering a writ of restitution in their favor therefor, further ordered, adjudged and decreed on the finding aforesaid, that the sum of \$305.83, "be, and the same is hereby declared a charge and lien upon (describing the land) in favor of said defendant W. D. Jamison and against these plaintiffs, and that a special *feri facias* may issue to enforce said lien." That sum not having been paid, Jamison, the present plaintiff, on

the 18th of February, 1904, instituted the present action against Malinda Dameron, Floyd F. Dameron, Thomas Harvey, Mary M. Dameron, Sarah F. Dameron, Theresa E. Dameron and George S. Meyers, all of whom had been plaintiffs in the first mentioned suit, and also against Clem Lindsay, Sr., Clem Lindsay, Jr., Linnie Lindsay and Minnie L. Morris. It is averred in the petition on which the case was tried, that George Meyers, one of the plaintiffs in the original suit, had conveyed his interest in the land to Margaret E. Lindsay, who took, as it is averred, with full knowledge and notice of the judgment; that she afterwards died intestate, leaving as her only heirs the defendant Clem Lindsay, Sr., Clem Lindsay, Jr., Linnie Lindsay and Minnie L. Morris, whom, it is averred, took and now hold the interest of said Margaret E. Lindsay in said land by inheritance and not as purchasers for value, and it is averred that James William Dameron, who was a party plaintiff in the original suit, died intestate, leaving the defendants Malinda, Mary M., Sarah F., and Theresa E. Dameron, as his heirs, whom, it is averred, hold the interest of said James William Dameron in the land by inheritance, and not as purchasers for value, and are hence chargeable with notice of the judgment. Plaintiff states that no part of the judgment in his favor has been paid and that the whole thereof is due and unpaid and that by virtue of "the revenue law of 1872, section 221, page 1207, vol. 2, Wagner's Statutes of Missouri, under which said judgment was rendered in favor of this plaintiff, the amount of such judgments bears 10 per cent interest per annum from date of judgment and until paid and is made a lien upon said land." He therefore demands judgment for the \$305.82, with ten per cent interest from September 29, 1892, and that the judgment when rendered be declared a charge and lien on the land and for such other orders and relief as may be just and proper in the premises and for costs of suit.

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The answer set up the judgment before noted; denied that it was a personal judgment; averred that more than ten years having elapsed since the rendition of the judgment, that it was not kept alive; that no execution or other process ever issued to keep it alive, and that the lien of the judgment had become extinguished by the lapse of time and is dormant and void under the provisions of what is now section 6786, Revised Statutes 1899. It is further averred in the answer that immediately after the rendition of the judgment, the defendants here had offered to pay to Jamison the amount of the lien; that Jamison had refused to accept payment thereof, claiming title to the land, and that he afterwards instituted various suits in ejectment against these defendants or their tenants for the recovery of the land on which the lien had been fixed by the circuit court, and they plead that by electing to sue in ejectment for the recovery of the land and claiming title thereto, plaintiff has waived his right to the lien and the enforcement thereof and is estopped by his conduct from claiming anything by virtue of the lien.

The case was afterwards dismissed as to George S. Meyers and coming on to be heard and being submitted to the court on the records of the several suits aforesaid, as well as on some oral testimony tending to prove that these defendants, through their attorney, had offered to pay off the judgment but that plaintiff here had refused to receive it, he claiming to own and be entitled to possession of the land, the court, a jury having been waived, found in favor of defendants and entered judgment accordingly. No declarations of law were asked or given. Plaintiff in due time filed a motion for new trial, which was overruled, and praying an appeal, having saved exceptions to the several adverse rulings of the court, has brought the case here in due form.

REYNOLDS, P. J. (after stating the facts).—
Section 219, pp. 1206-1207, Wagner's Statutes, which is

section 220, p. 129, Sessions Acts, 1872, and which is the section referred to as section 221, provided, in substance, that if the holder of a tax deed be defeated in an action against him for the recovery of the land sold, the successful claimant shall be adjudged to pay such party claiming under the tax deed, the full amount of all taxes paid by the purchaser on such land at the time of the purchase and all subsequent taxes paid by him, together with the amount of the redemption money provided for by law and interest for the whole amount of such taxes from the time of the payment thereof, at the rate of ten per cent per annum, "which judgment shall be a lien upon the real estate in controversy and may be enforced by execution as in other cases of judgments and decrees of said court." It is contended by the learned counsel for the appellant in this case, that the judgment referred to and sued on is a personal judgment as well as a charge against the land and what is really sought in this action seems to be to recover a personal judgment against these defendants for the amount of that judgment then rendered and for the accrued interest thereon from the date of its rendition, although that theory is hardly compatible with the demand for judgment set out in the amended petition upon which the case was tried, which demands, as will be noted, judgment for the amount, "and that such judgment, when rendered, will be declared a charge and lien on said land." But the case has been tried in the circuit court by each side and presented to us upon that theory. That is to say, it was tried and is before us on the theory that it is a suit on an unpaid personal judgment, to recover the debt evidenced by the judgment.

It is argued by counsel for appellant, that although the judgment rendered is not in form a personal judgment, yet the statute of 1872, under which it was given, controls and directs the character and the extent of the judgment, and that this statute determines the contract between the parties to the judgment and becomes

a part of it; that the manner in which it shall be executed is prescribed by the statute and any erroneous direction or attempt to direct its force or effect does not affect the force or manner of the execution of the judgment; that the judgment must be given the force and meaning and effect which the law gives it, when construed in connection with the law under which it was rendered. We agree with this contention of counsel, in so far as he argues that the law directs the force and mode of enforcement of a judgment and that it is not material that the judgment should, in itself, set out either its force or the mode of enforcement. [Houcks v. Cross, 67 Mo. 151; Crook v. Tull, 111 Mo. 283, 20 S. W. 8.] But we do not agree with the conclusion which he draws, that this section of the statutes of 1872 contemplates a personal judgment.

This litigation has been going on between these same parties over this same land and their respective titles to it, for a number of years and has been before the court several times. Under the title of Dameron v. Jamison, it will be found reported in 143 Mo. 483, 45 S. W. 258. There Judge WILLIAMS, in referring to this part of the judgment awarding this plaintiff the amount paid out by him by way of taxes, etc., on the land says, at page 492: "The court, as authorized by the statute, gave him a lien upon the land for the taxes paid." Under the title of Jamison v. Martin, 184 Mo. 422, 83 S. W. 750, another phase of this controversy was presented before the Supreme Court, and Judge MARSHALL, who delivered the opinion of the court, having before him this part of the judgment now relied upon, says, at page 430: "The judgment in the former case here pleaded was not upon condition. It did not provide that the plaintiffs therein should have restitution of the premises upon condition of a prepayment by them in a specified time of the taxes the defendant had paid. On the contrary, that judgment awarded the possession to the plaintiffs, and charged the land with a lien

for the taxes the defendant had paid. Each, therefore, was entitled to an immediate execution for the enforcement of the portion of the judgment which was in his favor and neither was obliged to wait until the other first acted. All that remained for the defendant to do under the judgment was to ask for the issuance of the special execution, ordered by the judgment, and thereby to collect the judgment. This could have been done by the defendant at any time during the life of the judgment. It is his own fault if he did not do so." We can come to no other conclusion, with these two cases before us, and in the light of the construction that has always been placed upon our revenue law, than that this judgment originally entered in favor of the plaintiff here, defendant in that suit, was not a personal judgment against these defendants, but was a judgment *in rem*. We so understand the section of the statute before referred to. So construed it is in harmony with the spirit which has always prevailed in our revenue laws, that is to say, that judgment for taxes, in tax suits, while in form judgments against the defendants in the suit, for the amount of taxes, interest, penalties and costs, are judgments *in rem* and not *in personam*. [Neenan v. City of St. Joseph, 126 Mo. 89, 28 S. W. 963; State ex rel. Hayes v. Snyder, 139 Mo. 549, 41 S. W. 216.] Nor is there any difference in the effect and force of these judgments, whether the defendants are personally served and appear, or where the defendants are brought in by publication of notice only and do not appear. In either case, the judgment goes, so far as concerns its enforceability, against the land alone. Herein they differ from those cases wherein it is said that while the proceeding and judgment are *in rem*, and cannot be enforced against the person, or outside of the jurisdiction of the court in which they were rendered, unless the defendant has appeared and submitted himself to the jurisdiction of the court, yet if he has appeared, that while the proceeding may have been originally *in*

rem, yet if there be a judgment for the debt and against the *res*, and also over for the debt, if on sale of the *res* the judgment for the debt is not satisfied, the defendant can be held for the difference; in such case the judgment is both *in rem* and *ad personam*. But as we understand the whole theory of our revenue laws, the lien which the State has for the taxes is against the land, and the judgment is a lien against the land and not against the owner, and cannot be made on general execution against the owner but only on special *fiery facias* which the state has for the taxes is against the land, this section of the statute to do is to transfer to the purchaser at the tax sale the lien of the state for the taxes, and the purchaser at the tax sale can recover only what the state could, namely, a lien against the land. [Carman v. Harris, 61 Neb. 635.] That is what we understand is held by our court in Rowe v. Current River Land & Cattle Co., 99 Mo. App. 158, 73 S. W. 362, where this same section 219 of the Act of 1872 is considered. As noted in this last case, this section 219 of the Act of 1872 was dropped out of the amended general revenue law adopted in 1877, the latter with various amendments being our present law. What is now section 9304, Revised Statutes 1899, appeared subsequently in its present form in the Act of 1877. Very clearly it makes the judgment a lien on the land alone. While we have no longer in our statutes what was formerly this section 219, we have provisions somewhat along the same line in the Act of March 6, 1903, Laws 1903, p. 254 (sections 9319-1 and 9319-2, Ann. Stat. Mo., 1906), which, in substance, provide that when a decision adverse to the defendant claiming under a tax sale is rendered, that the court shall adjudge by its decree the amount of money due the defendant on account of the taxes and interest thereon paid out under his tax purchase or tax title, and the amount so found "shall be and constitute a lien upon the lands recovered or in controversy." This is in line and in harmony

with the spirit of the revenue law that taxes are liens against the land and not a personal debt of the land owner. These two sections of the Act of 1903 have been before our Supreme Court in *Burkham v. Manewal*, 195 Mo. 500, 94 S. W. 520; *Haarstick v. Gabriel*, 200 Mo. 237, 98 S. W. 760; *Stewart v. Lead Belt Land Co.*, 200 Mo. 281, 98 S. W. 767; *Manwaring v. Missouri Lumber & Mining Co.*, 200 Mo. 718, 98 S. W. 762; and before this court in *Petring v. Current River Land & Cattle Co.*, 111 Mo. App. 373, 85 S. W. 933, and while the point here involved was not in decision, there is no intimation that the act goes any further than to subrogate the purchaser to the lien of the State. The plaintiff himself in this case practically concedes the point when he attempts to extend his right to a judgment beyond the plaintiffs against whom it was rendered in the first suit and to bring within its force and effect others who were not partes to that case but who have since acquired an interest in the land, and dismissed as to Davis who had parted with his interest. Above all, this very judgment does not purport to be a personal one, but is one against the land itself. We know of no case, have been referred to no authority, that authorizes a suit on a judgment *in rem*. The sole remedy for the enforcement of such a judgment, if it is still alive, is by special execution against the *res*. Without going further into the questions raised by counsel for the respondent as to estoppel, and treating this case on the theory upon which it was tried by the lower court, that is to say, as an action on a judgment we hold to be *in rem* alone to recover a personal judgment against these defendants, we think the conclusion arrived at by the trial court is correct and that its judgment should be affirmed. It is so ordered. All concur.

**W. C. EVANS, Respondent, v. MODERN WOODMEN
OF AMERICA, Appellant.**

St. Louis Court of Appeals. Argued and Submitted February 7,
1910. Opinion Filed February 21, 1910.

1. **FRATERNAL BENEFICIARY ASSOCIATIONS: Action on Certificate: Defenses.** Mutual benefit insurance societies are not subject to the Missouri laws regulating defenses by old-line companies, and are entitled to the application of the doctrine of representations and warranties in all its rigors of interpretation as a defense to an action on their certificates.
2. ———: ———: ———: **Age of Insured: Misstatement in Proof of Loss: Explanation: Question for Jury.** In an action on a mutual benefit certificate, it was shown the beneficiary stated in the proofs of death that insured was born on December 22, 1880, whereas his application for membership stated he was born on December 22, 1881.. The beneficiary testified that "he couldn't be positive as to the date of birth of insured, he had made no inquiry to ascertain it and had no means of knowing except from memory." *Held*, there was enough before the jury, taking into consideration the application of insured and the testimony of the beneficiary, to warrant them in determining whether or not a misstatement as to his age had been made by insured in his application, the real fact to determine being the age of insured, not what someone else, even the beneficiary, may have said about it.
3. ———: ———: **Forfeiture of Membership: Uncontradicted Evidence: Directing Verdict.** In an action on a mutual benefit certificate, where the uncontroverted evidence shows a forfeiture of membership, it is the duty of the trial court to direct a verdict for defendant.
4. ———: ———: **Intemperance of Insured: Intoxication at Time of Death: Question for Jury.** In an action on a mutual benefit certificate, whether the certificate was void by reason of the alleged intoxication of insured at the time of his death and by reason of his alleged intemperance during the time he was insured, was for the jury to determine, the evidence being conflicting.
5. ———: ———: ———: **Construction of Certificate: "Intemperate" Defined.** Where a mutual benefit certificate provided for forfeiture in case insured should become intemperate in the

use of intoxicating liquors, the word "intemperate" should be held to mean not the excessive or habitual use of intoxicating liquors, but the habitually excessive use thereof.

6. ———: ———: ———: ———: **Failure of Local Camp to Prefer Charges: Evidence.** Where, in an action on a mutual benefit certificate, defendant claimed that insured was intoxicated at the time he was killed and that he was intemperate in the use of liquors, in violation of the policy, evidence that at no time had insured been tried by his local camp for intemperance or any other offense was incompetent.

Appeal from St. Francois Circuit Court.—*Hon. Chas. A. Killian*, Judge.

AFFIRMED.

Benj. D. Smith and *Benj. H. Marbury* for appellant.

(1) The contract herein sued on is a contract between the member and the society and includes the application, the certificate and the constitution and by-laws of the defendant. 3 Am. and Eng. Ency., of Law, Vol. III, (2 Ed.), p. 108, and cases cited therein; Bacon on Benefit Societies, secs. 37, 91, 116; Niblack on Benefit Societies, sec. 136. (2) A warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. The stipulation is considered to be on the face of the policy, although it may be written in the margin or transversely, or on a subjoined paper, referred to in the policy. Angell on Insurance, sec. 140; Bacon on Benefit Societies, sec. 194; 3 Cooley's Briefs on the Law of Insurance, p. 1932; Joyce on Insurance, sec. 1944; Bliss on Life Insurance, sec. 45; May on Insurance, sec. 156, and authorities cited in above texts. (3) The answers in the application for the benefit certificate herein sued on are warranties. *McDermott v. Modern Woodmen of America*, 97 Mo. App. 636, 71 S. W. 833; *Finch v. Modern Woodmen of America*, 113 Mich. 646,

71 N. W. 1104; *Genrow v. Modern Woodmen of America*, 114 N. W. 1009; *Bumgart v. Modern Woodmen of America* (Wis.), 55 N. W. 713; *Modern Woodmen of America v. Von Wald* (Kan.), 49 p. 782. (4) As a warranty is in the nature of a condition precedent to the validity of a policy, and must be literally true, if the fact warranted is not true, there is a breach of warranty. It follows as a matter of course, that a breach of warranty will avoid the policy. This principle is so fundamental that it scarcely needs the citation of authorities to support it. 3 *Cooley's Briefs on the Law of Insurance*, p. 1950, and cases cited. (5) In view of the general principle that the materiality of the fact is wholly unessential in the case of a warranty, it is readily deduced that where there is a breach of warranty the policy is avoided, though the statement on which the breach is predicated is in no way material to the risk. 3 *Cooley's Briefs on the Law of Insurance*, p. 1951; 3 *Joyce on Insurance*, sec. 1962; *McDermott v. Modern Woodmen of America*, 71 S. W. 833; *Beard v. Royal Neighbors of America*, 89 Pac. 83. (6) If an answer which the applicant warrants is literally true is false the contract is annulled, whether the false statement was fraudulently or innocently made. 3 *Joyce on Insurance*, sec. 1964; *May on Insurance*, sec. 156; 1 *Bacon on Benefit Societies*, sec. 197; 3 *Cooley's Briefs on the Law of Insurance*, p. 1954; *McDermott v. Modern Woodmen of America*, 71 S. W. 833; *Modern Woodmen of America v. Von Wald*, 49 Pac. 782. (7) Proofs of death furnished to the Society are prima-facie evidence of the facts therein stated and are conclusive unless the beneficiaries show that the statements made therein were erroneous or were given through mistake. *Almond v. Modern Woodmen of America*, 113 S. W. 695; *Insurance Co. v. Newton*, 22 Wall. 32; *Hassencamp v. Life Ins. Co.*, 120 Fed. 475; *Hanna v. Life Ins. Co.*, 44 N. E. 1099; *Walther v. Insurance Co.*, 4 Pac. 413; *Modern Woodmen of America v. Von Wald*, 49 Pac. 782; *Hart*

v. Trustees, etc., 84 N. W. 851; 3 Elliott on Evidence, sec. 2387; 2 Wigmore on Evidence, p. 1265. (8) Where as in this case the admission contained in the proofs of death, which was not shown on the trial of the case to have been erroneous or to have been given through mistake, showed that Evans was born on the 22d day of December, 1880, instead of the 22d day of December, 1881, as warranted in his application for membership, it became the duty of the trial court to direct a verdict for the defendant on the ground that, under the terms of the contract sued on, there was a fatal breach of warranty; the court having refused to so direct the jury, the Appellate Court will on appeal reverse the judgment. *Reichenbach v. Ellerbe*, 115 Mo. 588, and cases cited therein; *Lavin v. Grand Lodge*, 104 Mo. App. 1; *Carroll v. Rapid Transit Co.*, 107 Mo. 653. (9) If but one natural and rational inference can be drawn from the undisputed facts, it is the duty of the Court to treat the matter in question as one of law and direct the proper verdict. *Hardinger v. Modern Brotherhood*, 103 N. W. 74; *Somerville v. Knights Templar*, 11 App. D. C. 417; *White v. Ins. Co.*, 105 N. Y. S. 87; *Sovereign Camp v. Hruby*, 96 N. W. 998; *Clemens v. Royal Neighbors*, 103 N. W. 402; *Pagett v. Connecticut, etc., Co.*, 66 N. Y. S. 804; *Seybold v. Supreme Tent*, 83 N. Y. S. 149; *John v. Northwestern, etc., Assn.*, 63 N. W. 276. (10) The court's instruction (D) that the term intemperate meant "the excessive or habitual use of intoxicating liquor" was erroneous. The word "intemperate" means any immoderate or excessive use of intoxicating liquors, and the element of "habitual use" should not have been included in said definition. Defendant's instruction No. 2 on this question, refused by the court, was correct and should have been given. *Beller v. Knights Pythias*, 66 Mo. App. 499; *Zeigler v. Commonwealth*, 14 Atl. (Pa.) 237; *Miller v. Insurance Co.*, 31 Ia. 21, 7 Am. Rep. 122, 34 Ia. 222; *Insurance Co. v. Davey*, 123 U. S. 739, 31 L. Ed. 315; *Insurance Co. v. Ward*, 140 U. S. 76,

35 L. Ed. 371; *Marcoux v. Society of Beneficence*, St. John Baptist, 39 Atl. (Me.) 1027; *Mullinix v. People*, 76 Ill. 211. (11) When a person who is intoxicated commits, without provocation, an assault on another, the only reasonable inference to be deduced from said actions is that the commission of said assault was due to intoxication, and when a mortal combat ensues as the result of said assault, and the person who committed said assault is killed, his said death can properly be said to have resulted from his intemperate use of intoxicating liquors, within the provisions of the contract providing for forfeiture from death resulting "directly or indirectly from his intemperate use of intoxicating liquors." *Miller v. Ins. Co.*, 34 Ia. 222. (12) It is well settled in this State that the provisions in an insurance contract avoiding liability if the insured shall come to his death "in consequence of any violation, or attempted violation of the laws of any State;" relates to a crime, the character of which directly increases the risk, regardless of whether said crime is a felony or a misdemeanor. *Wolff v. Ins. Co.*, 5 Mo. App. 236; *Brown v. Supreme Lodge K. of P.*, 83 Mo. App. 633; *Davis v. Modern Woodmen of America*, 98 Mo. App. 713, 73 S. W. 923. (13) And where, as in this case, the insured was the aggressor and committed an unprovoked assault upon the man who killed him, it is not essential for the defendant to prove that his killing was justifiable homicide. It is enough if the act is unlawful in itself, and the consequences flowing from it are such as might have been reasonably expected to happen, for in such a case the ultimate result is traced back to the original proximate cause. *Davis v. Modern Woodmen of America*, *supra*; *Ins. Co. v. Seaver*, 19 Wall. 531, 2 L. Ed. 155; *Murray v. Ins. Co.*, 96 N. Y. 614, 48 Am. Rep. 658; *Bloom v. Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469. (14) It was error to instruct the jury that unless they found that Evans' death occurred as the "ordinary consequence" of the assault committed on Holly, they should find for the plaintiff.

Bloom v. Ins. Co., (supra). (15) Notwithstanding the fact that the burden was on the defendant to establish that John Evans' death was in consequence of the violation of the law of Missouri, the defendant was not required to prove that fact beyond a reasonable doubt, but merely by a preponderance of the evidence. The same rule applies with relation to the necessity, if this court holds that it be a necessity, of establishing that his death was due to a justifiable homicide. Marshall v. Ins. Co., 43 Mo. 586; Edwards v. Knapp, 97 Mo. 432; Nichols v. Winfren, 79 Mo. 544; Culbertson v. Hill, 87 Mo. 544. (16) The question of the competency of evidence of experiments is one of law for the court to determine, and such experiments, evidence of which is sought to be introduced, must have been made under circumstances and conditions similar to those constituting, as it were, the premises from which the original event is alleged to have been the conclusion. 12 Am. and Eng. Ency. Law (2 Ed.), pp. 409 and 406, citing; Railroad v. Champion, 32 N. E. (Ind.) 874; Tesney v. State, 77 Ala. 33.

W. L. Hensley and Chas. G. Revelle for respondent.

(1) The evidence wholly fails to establish that the decedent's age was not as represented in his application for membership. Lemen v. Ins. Co., 49 La. Ann. 1191; Baldi v. Ins. Co., 24 Pa. Sup. Ct. 275. In considering this phase it must also be remembered that the rule in this class of cases is that forfeitures, since they are uniformly in the interest of the insurer which has received its benefits from the contract, are looked upon with disfavor, and every reasonable doubt is to be resolved against them. Nothing is to be taken as conceded but what is given in unmistakable terms, or clearly proven to the satisfaction of reasonable minds. Lewine v. Superior Lodge K. of P., 122 Mo. App. 560; Foglesong v. M. B. of America, 121 Mo. App. 553; Loesch v. Union

C. & S. Co., 176 Mo. 666; Seibert v. Chosen Friends, 23 Mo. App. 168. If this court were at liberty to weigh the evidence, we feel no hesitancy in saying that it would find no fault with the verdict on this question of fact, since no other conclusion could be intelligibly reached. Among other authorities supporting our views in this respect, we call attention to the following: Home Benefit Assn. v. Sargant, 142 U. S. 691; Ins. Co. v. Stibble, 46 Md. 302; Beckett v. N. W. Masonic Aid Assn., 67 Minn. 298; Wells v. Ins. Co., 19 App. Div. (N. Y.) 18. (2) The evidence abundantly supports the jury's finding that the insured did not come to his death in consequence of the violation, by him, of the laws of the State. In construing this ground of forfeiture, it has been uniformly held that the intemperate use of intoxicating liquor must have been the direct cause of the death. Miller v. Ins. Co., 31 Ia. 235; Ins. Co. v. Stibble, 46 Md. 314. (3) The court committed no error in its rulings on the admission and exclusion of evidence. Defendant complains first, because its witness, Brown, who for six years had been clerk of the lodge, was permitted to state whether or not during the life and membership of deceased he was tried by the order on the charge of the intemperate use of intoxicating liquor. Plaintiff had a right to know whether, in fact, deceased had been tried by the lodge, since, if he had and was not suspended, this amounted to a waiver of forfeiture on that account. Callies v. Modern Woodmen, 98 Mo. App. 526; Lewis v. Assn., 76 Mo. App. 586; Frame v. Woodmen, 67 Mo. App. 127. After the witness testified that deceased had not been tried on this charge, defendant was evidently satisfied, since it did not move to strike out the question or answer. All objections, therefore, were waived. State v. Bateman, 198 Mo. 223; Waddell v. Railroad, 113 Mo. App. 687.

STATEMENT.—Action by plaintiff on a benefit certificate, taken out by one John Samuel Evans, hereafter referred to as John Evans, or Evans, on his life, loss payable in case of death to plaintiff, who is his brother. It is averred in the petition that John Evans kept and performed all the terms and conditions of the policy; that up to the time of his death he had paid all the assessments and dues levied, and that the policy was in full force at the time of his death; that he died on the 22d of February, 1908; that plaintiff had furnished due proofs of loss to the defendant, whereby it became liable to him in the sum of \$2000, and that not being paid he sues.

The answer, averring that plaintiff is a fraternal beneficial society, organized, incorporated and existing under and by virtue of the laws of the State of Illinois, relating to fraternal beneficial societies, and duly authorized to transact business as such in the State of Missouri, under and by virtue of the laws of this State, relating to fraternal beneficial societies, and admitting that John Evans made application for membership and that a membership certificate was issued to him, loss payable on his death to the plaintiff, and denying all the other allegations in the petition, and setting up the terms and conditions upon which membership is granted and benefit certificates issued in its order, and after averring that John Samuel Evans, when he became a member and received the certificate, was subject to all the conditions imposed on members by the constitution, by-laws and articles of organization of the company, and expressly agreed in his application for membership that all statements made therein were warranties, sets up as the first affirmative defense, that contrary to the conditions and provisions of the contract between John Samuel Evans and the defendant organization, he (Evans) had come to his death in consequence of a violation by him of the laws of the State of Missouri, in that he made an assault upon one Holly, and that said

Holly, in order to defend himself and while defending himself from the assault of Evans, had shot and killed Evans; that the assault was contrary to and in violation of the laws of the State of Missouri; that Evans came to his death in consequence of that violation and that by reason thereof the benefit certificate sued on became null and void, and defendant was thereby released and discharged from any and all liability thereon. As a second affirmative defense, it is set up that John Samuel Evans, contrary to the terms and conditions of his membership in the order, became and was intemperate in the use of intoxicating liquors, by reason whereof the benefit certificate sued on became and was null and void. For a third affirmative defense, it is set up that John Samuel Evans came to his death as a result of the intemperate use of intoxicating liquors by him; that while intoxicated and under the influence of intoxicating liquors, he had engaged in the controversy with and committed the assault on Holly, before referred to, and that Holly, in defending himself, had shot Evans, and by reason thereof the benefit certificate was forfeited and became null and void. The fourth affirmative defense set up is that in his application for membership John Samuel Evans stated that he was born in Crawford county, Missouri, on the 22d day of December, 1881; that that answer was false and untrue, said Evans having in fact been born prior to that date and that by reason of this false and untrue answer, a breach of the warranty as to the truth of statements contained in the application for membership had been committed and the benefit certificate forfeited.

The reply was a general denial.

At the trial of the cause before the court and jury, the certificate of membership, which is in ordinary form, was introduced by plaintiff, as also the application for membership, by which latter it appeared that John Samuel Evans stated that he was born in Crawford county, Missouri, on the 22d of December, 1881. The applica-

tion contained the usual covenants and warranties exacted by this class of societies. Evidence was introduced of the fact of the death of John Samuel Evans, which occurred on the 22d of February, 1908. The evidence also showed that proofs of death of Evans had been duly forwarded to the proper officer of the defendant. Plaintiff thereupon rested.

The defendant introduced a stipulation, agreed to by counsel for the respective parties, to the effect that the defendant is a fraternal beneficial society, organized, incorporated and existing under and by virtue of the laws of the State of Illinois, relating to fraternal, beneficial societies; that during all the times mentioned in plaintiff's petition, defendant was a fraternal beneficial society, as defined by the statutes of Missouri relating to fraternal beneficial societies; that during all of said times the defendant was and is duly and regularly authorized to transact business as a fraternal beneficial society, under and by virtue of the laws of the State of Missouri, as found and contained in article 11, chapter 12, of the Revised Statutes of Missouri (1899); that the exhibit attached to the stipulation is a correct copy of the by-laws of the defendant, in force and covering the period involved in this case, each party reserving the right to produce such parts of the by-laws as they chose without further proof of authenticity than in the stipulation. Under the stipulation, the defendant then offered section 11 of the by-laws, which is a prohibition against intemperance and is to the effect that if any member of the society shall become intemperate in the use of intoxicating liquors or if his death shall result directly or indirectly from his intemperate use of intoxicating liquors, the benefit certificate shall become void. The original application of John Evans for membership, which had heretofore been introduced by plaintiff, was introduced and read in evidence by defendant. Proofs of death which had been forwarded to defendant were also introduced, which consisted of the affidavit

of the plaintiff, W. C. Evans, that he had known deceased for 27 years; that he "was born at Crawford county, in the State of Missouri, on the 22d of December, 1880, and was at the date of his decease, which occurred on the 22d of February, 1908, 27 years and two months old." Along with the proofs of death was the certificate of the physician, that John Evans had come to his death as the result of gunshot wounds inflicted on him at Doe Run, in Missouri, on the 22d of February, 1908. Plaintiff also in his affidavit stated that he was the person named in the membership certificate as beneficiary; that he was related to the deceased as brother. Accompanying the proof of death forwarded to defendant, and on blanks furnished to make proof, were instructions, among others, to the effect that before claims could be paid, in case an inquest had been held on the deceased, a duly authenticated and certified copy of the coroner's proceedings, as well as all evidence and the verdict, must accompany the proofs. After the introduction of the affidavit of plaintiff, the defendant offered in evidence the coroner's certificate covering the proceedings at the inquest on the body of John Samuel Evans, which, among other things, contained the verdict of the coroner's jury, to the effect that the deceased came to his death from a gunshot wound received from a revolver in the hands of one Holly, and that the death took place in Holly's restaurant in Doe Run, February 22, 1908. When this coroner's certificate was introduced along with the other proofs of death, plaintiff objected to its admission. The court overruled the objection as to all that part of the proofs of death, except the verdict of the coroner's jury, as to which the court indicated, by its ruling, that it was not admissible, but made no definite ruling. Whereupon defendant asked leave to recall a witness, who testified that he was the secretary of the camp of the order at Doe Run; that plaintiff had brought in proofs of loss which did not include the coroner's verdict; that he (witness), as the

clerk of the local camp, had obtained the copy of the coroner's verdict and attached it to the proofs which he sent on, but did not know whether plaintiff was aware of this or not. Defendant then read from its by-laws sections requiring the furnishing of this certificate of the coroner and one of the sections providing that the clerk of the local camp is made the agent of the camp and not the agent of the head camp in transactions with the order. Defendant again offered in evidence the certified copy of the coroner's verdict attached to the proofs of death. The objection being renewed and sustained by the court, defendant duly excepted. Defendant then introduced oral evidence tending to show the circumstances under which John Samuel Evans came to his death; that he was under the influence of liquor when he went into the restaurant kept by one Holly at Doe Run. Holly was in the front room, behind the counter. Evans asked him for lunch, which Holly refused to serve, whereupon Evans slapped Holly with his open hand, a hard lick. Holly ordered Evans out of the place and walked around to the end of the counter, shook his hand at Evans and told him to go out, that he didn't want any trouble; ordered Evans out. When Evans didn't go, Holly threw a bottle at him. Evans dodged the bottle and made a rush toward Holly, who was about six feet away. Evans threw up his left hand and struck Holly, who fell down. Evans then got on top of Holly and they were both lying on the floor struggling. While they were on the floor, Holly shot twice, inflicting the wound which resulted in Evans' death. This is rather a brief and possibly not an accurate statement of the evidence for defendant, but sufficient for all purposes as showing the facts as in evidence for defendant; that is to say, that John Evans was intoxicated and brought on the quarrel with Holly; that in the scuffle which ensued between Holly and John, the latter was shot twice by Holly, and from these shots, either of

which it is in evidence would have proved fatal, he died. Evidence tending to show the habit of Evans as to drinking was also offered and introduced on part of defendant, the tendency of which was to prove that he was intoxicated at the time of the difficulty in which he met his death, and that on several occasions prior thereto he had been under the influence of liquor. Defendant thereupon rested its case, and plaintiff, in rebuttal, introduced witnesses who gave evidence tending to show that Holly was the aggressor in the fight; that Evans was not intoxicated and that at the time of his death, he was neither armed nor the aggressor in the fight. The plaintiff himself on the witness stand and in rebuttal testified that he made the statement which he had sworn to before a notary public, in relation to the age of his brother John Samuel. To quote from the testimony of plaintiff in full on this subject, he testified that he had gone before a notary, who filled out the blank proofs. That he told the notary, that "to the best of my knowledge he (John S. Evans) was born in 1880; I couldn't be positive that is the date, that was my impression. I have no means of knowing except from memory. I haven't made any inquiry to ascertain his true age. I don't know any more now than I did then. I couldn't be positive about it, it was wholly a matter of impression with me." On cross-examination he testified: "I made the affidavit in the death proofs, and at that time the statement contained therein that my brother John Samuel Evans was born on the 22d day of December, 1880, was my best impression." In rebuttal, a witness was asked by counsel for plaintiff whether or not at any time from the time the policy was issued until the time of his death, John Samuel Evans was tried by the local camp upon the charge of intemperate use of intoxicating liquors or any other charge. This was objected to by the defendant as not an issue in the case and not tending to prove any issue in the case, and as improper and incompe-

tent and not proper in rebuttal. The objection was sustained by the court. The witness was then asked whether or not at any time from the time the policy was issued until the time of his death, Evans was tried by the local lodge upon the charge of the intemperate use of intoxicating liquors or any other charge. This was objected to for the reasons above stated, and for the further reason that it did not tend to prove any issue of the case, is not in rebuttal, no waiver having been plead by reply, and therefore not competent. The court remarked that if the lodge had not had such a trial, it would not be competent, so that he would let the question go in; "will let witness answer that question from that view of the case." Exception was duly saved by the defendant, the further objection being made that it is not responsive to any issue in the case, whereupon the witness answered that insured was not so tried.

At the close of the evidence, defendant asked an instruction directing a verdict in its favor which the court refused to give and defendant duly saved its exception.

At the request of plaintiff the court gave instructions A, B, C, D and E. Instruction A was a general one, covering the issue of the policy, the death of Evans, furnishing of proofs of loss, and instructing the jury that if they found from the evidence in the case that John Samuel Evans and the plaintiff herein kept and performed all the terms and conditions of the policy and that defendant had failed to pay plaintiff two thousand dollars, then plaintiff is entitled to a verdict for that amount, with interest at the rate of six per cent per annum from the date of the demand of payment by plaintiff until date of the trial. While the giving of this instruction is excepted to by the defendant, no error is assigned to it in the assignment of errors lodged with this court, so that it is unnecessary to set it out with more particularity. Instruction B

is substantially to the effect that if the jury found from the evidence in the case that John Samuel Evans assaulted Holly, "yet before you can find the issues in this cause for the defendant on that ground alone, you must further find and believe from the evidence that said assault was in violation of the laws of this State, and that the death of said John Samuel Evans occurred as the ordinary consequence of said assault; and unless you do so find and believe, your finding on this defense will be for the plaintiff." Instruction C is, in substance, that although the jury might find and believe from the evidence in the cause, that after the issuance to Evans of the insurance policy sued on and before his death, Evans used and drank intoxicating liquors, yet the jury will not find the issues for the defendant on that ground alone, unless they further found and believed from the evidence that Evans became intemperate in the use of intoxicating liquors. Instruction D told the jury "that by the term 'intemperate,' as used in these instructions, is meant the excessive or habitual use of intoxicating liquor." Instruction E told the jury, substantially, that the statement contained in the affidavit of the plaintiff in the proofs of death furnished by him to defendant with relation to the date of the birth of John Samuel Evans, "is an admission by the plaintiff as to the date of the birth of said John Samuel Evans, and establishes said fact unless said statement is explained or overcome by the evidence in this cause to your satisfaction."

At the instance of the defendant the court gave ten instructions, numbered from 5 to 14, both inclusive. Instruction No. 5 told the jury that the application, the benefit certificate and the by-laws constitute the contract sued on and each were mutually binding upon the plaintiff and the defendant. Instruction No. 6 told the jury that if they believed that John Samuel Evans committed the assault on Holly, without provocation, and that Holly, in order to defend himself from the assault, shot and killed Evans, the verdict must be for

defendant. Instruction No. 7 told the jury that if they found from the evidence that John Samuel Evans, without provocation, assaulted Holly, and that Evans engaged in a combat with Holly, in the course of which and in order to defend himself, Holly shot and killed instruction told the jury that if they found from the Evans, the verdict must be for defendant. The eighth evidence that Evans, without provocation, struck Holly, his act, under the laws of this State, constituted an assault and is such a violation of the laws of the State as is contemplated in the contract sued on. The ninth instruction told the jury that if they found that the death of Evans occurred in consequence of the assault, the verdict must be for the defendant. The tenth instruction told the jury that if they believed from the evidence that after the issue of the benefit certificate to him, Evans became intemperate in the use of intoxicating liquors, their verdict must be for the defendant. The eleventh instruction told the jury that if they found from the evidence, that on the 22d of February, 1908, and immediately prior to his death, Evans was intoxicated, and that his death was directly or indirectly due to intoxication, their verdict must be for the defendant. The twelfth instruction told the jury that if they found that on the 22d of February, Evans was intoxicated and while intoxicated engaged in a combat with or committed an assault on Holly and while defending himself, Holly killed Evans, then the verdict must be for the defendant. Instruction numbered 13 told the jury that if they found from the evidence that the statement of the insured, John Samuel Evans, in his application for membership in the defendant order, that he was born on the 22d of December, 1881, was not literally true, their verdict must be for defendant. The fourteenth instruction told the jury that while the burthen is upon the defendant to establish either or all of the defenses pleaded in its answer, "nevertheless it is only necessary for the defendant to establish said defenses,

or either of them, to the reasonable satisfaction of the jury, by a preponderance or greater weight of the evidence."

The defendant further asked instructions numbered 1, 2, 3 and 4. Number 1 is to the effect that on the evidence in the case, the jury must find for the defendant. In number 2, the defendant asked the court to instruct the jury that the term "intemperate in the use of intoxicating liquors," as used in the contract sued on, "refers to the excessive use of intoxicating liquors by the insured, and that the use of intoxicating liquors to such an extent as to cause intoxication or drunkenness, is the intemperate use of intoxicating liquors within the meaning of the contract herein sued on." In the third instruction, the court was requested to instruct the jury that if they found that on various occasions subsequent to the delivery to him of the benefit certificate sued on, Evans was drunk or intoxicated from the use of intoxicating liquors, the verdict must be for the defendant. In the fourth instruction the court was asked to direct the jury "that the statement contained in the affidavit of the plaintiff in the proofs of death furnished by him to the defendant herein, with relation to the date of the birth of said John S. Evans, is an admission by said plaintiff as to the date of the birth of said John S. Evans and binding upon him, and establishes on its face that the said John S. Evans was born on the 22d of December, 1880, and that the answer in his said application for membership, that he was born on December 22, 1881, was untrue." The court refused these four instructions, defendant excepting.

At the conclusion of arguments by counsel, the jury returned a verdict in favor of plaintiff for two thousand dollars, with interest from the 22d of March, 1908, a total of \$2051.65. Defendant in due time filed its motion for a new trial, as well as a motion in arrest, both of which were overruled, defendant excepting, and in due time applying for an appeal and filing its bond.

has brought the case here by appeal.

REYNOLDS, P. J. (after stating the facts).—Cases involving the liability of companies organized to carry on business on what is called benefit or benevolent insurance, have been so frequently before the appellate courts of the country, that it is unnecessary to set out with great particularity the restrictions and limitations thrown around their members by the constitution, by-laws and certificates of membership issued by them. With the idea that these organizations were benevolent, charitable and non-profit sharing, our lawmakers have been exceedingly liberal toward them, and have exempted them from practically all the laws of our State, governing old-line or regular insurance companies, and while by the laws relating to these latter, both by letter as well as construction, hardly any defense is open or available to an old-line, regular insurance company, and they are rarely before our courts as defendants, the benevolent or fraternal, as well as assessment companies, are constantly in court with exceedingly technical defenses, the doctrine of representations and warranties, in all its rigors of interpretation being available to them. This, however, is a matter entirely under control of our Legislature, which has seen fit to adopt it as the policy of the State, and with which the courts, beyond enforcing and interpreting the law as enacted, have no concern. We make these observations because of the fact that none of the defenses herein set up by this defendant would be available in favor of an old-line, regular life insurance company. Fortunately for the members of these benevolent associations, the determination of the fact of the defenses set up is left to the juries of the land. While it may be conceded in this case that the evidence of the defendant tended to show that the deceased was frequently intoxicated, and while the evidence is without contradiction that he was killed in a fight which the evidence strongly tends to prove was brought on by himself, and while there is a

discrepancy of a year in his age between that stated by himself and that stated by the plaintiff when he was making the proofs of death, these matters were all matters of fact to be determined by the jury under proper instructions. In this case they are so well and carefully and thoroughly covered by the instructions which the court gave, that we cannot say that the jury were either misdirected or lacking in proper direction, or that their verdict is unsupported by substantial evidence in the case. Without going into an examination of the authorities which the learned counsel on each side, with such great care and industry, have cited, it is sufficient to say that none of the authorities to which our attention has been called justify us in overturning this verdict, on the grounds assigned by defendant. Especially is this so as to the alleged misrepresentation as to age, or variance, more accurately speaking, between the date of his birth given by the insured and the date of his birth given by the plaintiff when making proofs of loss. This question of the discrepancy was submitted to the jury by such fair and full instructions that we could only disturb their verdict on this part of the case by holding that there was no evidence upon which to found the instruction itself, and we cannot do that, as we cannot say that. It is true that the testimony of the plaintiff in explanation of his knowledge of the true date of birth of the insured is not very satisfactory and rather meager, but that matter was fairly submitted to the jury under the instructions given at the instance of plaintiff, and its probative weight was for the jury. It is true defendant asked for a direction for a verdict on this, but we hold that to have been correctly refused.

In *Connecticut Mut. Life Ins. Co. v. Schwenk*, 94 U. S. 593, a case in which it appeared that the plaintiff in making proof of death had stated the age of the deceased differently from that stated by the deceased himself in his application for membership, it further

appears that the plaintiff, in explanation of this, had testified, in substance, that he had no positive knowledge of the age of the deceased, and that the age fixed by him in his affidavit was a mere impression founded upon the appearance of the deceased. This explanation of the variance is no more satisfactory than that given by the plaintiff in this case, but upon it the court held that it was sufficient to obviate the effect of the statement contained in the proofs and sufficient to raise an issue of fact to be determined solely by the jury. To the same effect, and referring to similar statements not based upon actual knowledge, are the decisions of the Supreme Court of Louisiana in *Leman v. Insurance Co.*, 46 La. Ann. 1189, and that of the Superior Court of Pennsylvania in *Baldi v. Met. Life Ins. Co.*, 24 Pa. Sup. Ct. 275. So the Supreme Court of Wisconsin held in *Bachmeyer v. The Mut. Reserve Fund Life Ass'n*, 82 Wis. 255. Appellant cites us in opposition to this position and in support of its proposition that the proofs of death furnished to the society are prima facie evidence of the facts therein stated, and are conclusive unless the beneficiary shows that the statements made therein were erroneous or were given through mistake, to many cases, among others, *Insurance Co. v. Newton*, 22 Wall. 32; *Hassencamp v. Mut. Ben. Life Ins. Co.*, 120 Fed. 475, and *Almond v. Modern Woodmen of America*, 133 Mo. App. 382, 113 S. W. 695. An examination of these cases and of the other authorities cited do not, however, militate against the rule laid down in the cases which we have above noted. Nor do the cases of *Reichenbach v. Ellerbe*, 115 Mo. 588, 22 S. W. 573; *Carroll v. Interstate Rapid Transit Co.*, 107 Mo. 653, 17 S. W. 889; and *Lavin v. Grand Lodge A. O. U. W.*, 104 Mo. App. 1, 78 S. W. 325, cited by appellant, bear on this particular matter or throw light upon it. The effect and the point decided in those cases is that where the uncontroverted evidence showed a forfeiture of membership, it is the

duty of the trial court to direct a verdict for the defendant. That proposition is not disputed, but does not meet the facts in this case, because the testimony of the plaintiff in this case was of such a character as to leave the determination of the real fact as to whether the insured had misstated his age himself or whether the plaintiff himself was in error, to the determination of the jury. This brings the case at bar within the case of *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, in which the *Reichenbach* case is practically criticised out of existence as authority for the proposition here relied upon by appellant. It might well be that the jury concluded, from the testimony of the plaintiff as to the vagueness of his information as to the date of the birth of his brother, the insured, that the statement of the insured was more likely to be correct than that of the claimant, the latter's statement based on such very indefinite information, falling short of knowledge. At any rate, there was enough before the jury, taking into consideration the application of the insured and the testimony of the plaintiff, to warrant the jury to determine as a fact whether or not there had been a misstatement of the insured in the application which he had made for membership, and after all the real fact to be determined in the case was the fact of age and not what some one else, even the plaintiff there, may have said about it.

The questions of whether the deceased was intoxicated at the time he met his death, or whether he was intemperate between the time of his connection with the defendant corporation and his death, were fully submitted to the jury on instructions of which appellant has no right to complain. The testimony in the case would justify the finding either way and by their verdict, the jury found against the defendant. In saying this, however, we do not wish to be understood as holding that the instruction marked "D," which the court gave at the instance of plaintiff, is a correct defi-

nition of the term "intemperate." As will be noted in the instruction, the court defined "intemperate," as used in the instructions, to mean "the excessive or habitual use of intoxicating liquors." This is not accurate. Intemperance, having reference to the use of liquor, may be defined to be the habitually excessive use of intoxicating liquors. It is not correct to say that the habitual use of intoxicating liquor constitutes intemperance, for while the habitually excessive use of intoxicating liquor is intemperance, the habitual use of intoxicating liquor is not intemperance, unless the habitual use is also excessive to the extent of producing intoxication. As this, however, was an error against the plaintiff, who is respondent, it is, of course, no ground for reversal. The refused instruction No. 2, which the defendant asked, covering the matter of intoxication, was more nearly correct than that given at the instance of plaintiff, but even that is not accurate, unless we interline in it after the word "use," the word "habitual," for an occasional use of intoxicants, even to the extent of drunkenness, as for instance one or two acts of over-indulgence in liquor, to the extent of intoxication, does not necessarily mean that the party so indulging is intemperate in the sense of the law.

There is one error connected with the case that we cannot pass over in silence, and that consists in the admission of the testimony offered on the part of the plaintiff, to the effect that at no time had the deceased been tried by the local camp for intemperance or any other offense. This evidence was improperly admitted, but we are not prepared to say that its admission was so material and so important as to seriously and materially damage the defendant. Under the facts in the case, we cannot hold that its admission was reversible error. Our conclusion upon the whole case is that the verdict and judgment of the lower court are

right. Accordingly the judgment must be and is affirmed. All concur.

**SCHOOL DISTRICT OF FREDERICKTOWN ex rel.
FREDERICKTOWN BRICK COMPANY, Re-
spondent, v. J. F. BEGGS et al., Appellants.**

**St. Louis Court of Appeals. Submitted on Briefs February 7, 1910.
Opinion Filed February 21, 1910.**

1. **TRIAL PRACTICE: Saving Exceptions.** Exceptions cannot be saved by record entries.
2. **APPELLATE PRACTICE: Rules: Abstract: Too Frequent Interlineations.** Under Rule 15 of the St. Louis Court of Appeals, which calls for a printed abstract in fair type, while occasional interlineations and corrections by pen or pencil will not be cause for disregarding the abstract, an abstract, consisting of forty pages, with pen and ink interlineations of matters, which should appear therein, on sixteen of them, and sometimes two or more on a page, is such a radical departure from the requirements of the rule as cannot be tolerated.
3. **PRINCIPAL AND SURETY: Schools: Bonds for Construction of Schoolhouse: Action by Materialmen: Bond Construed.** A bond given for the construction of a schoolhouse under a contract, which bond provides it "is made for the use and benefit of all persons who may become entitled to liens under said contract, or to whom said contractor might become indebted, and that it might be sued upon by such persons as if executed to them in proper person," while not in the language of section 6761, Revised Statutes 1899, which provides that a schoolhouse contractor shall execute a bond conditioned for the payment of all material used in, and all labor performed on, such work, whether by subcontract or otherwise, nevertheless covers the idea of said section; and an action would lie on said bond by a materialman, who furnished material which was used in the construction of the school building.
4. ———: ———: ———: ———: ———: **Term "Mechanic's Liens" not Literally Construed.** The expression in such a bond "that those who are entitled to a mechanic's lien are within it" is to be construed as if it read, "Those who but for the provisions of the law exempting public buildings from mechanics' liens are entitled to enforce a lien."
5. ———: ———: ———: ———: ———: **Common Law Bond.** Discarding the statute, such a bond is a good common law bond, and very clearly sets out those who are to be within its protection.
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6. CONTRACTS: For Benefit of Third Parties: May be Enforced.

A contract for the benefit of a third party may be enforced by him, even if he is not named in it, provided it appears he was in the minds of the contracting parties as being within its protection.

Appeal from Madison Circuit Court.—*Hon. Chas. A. Killian*, Judge.

AFFIRMED.

Tesreau & Chitwood for appellants.

(1) The law is well settled, that any change of the contract without the consent of the surety, destroys the identity of the contract and the surety is thereby discharged. *School District v. Green*, 134 Mo. App. 421; *Reissaus v. Whites*, 128 Mo. App. 135; *Burnes Estate v. Fidelity & Deposit Co.*, 96 Mo. App. 467; *Beers v. Wolf*, 116 Mo. 179. The liability of a surety is not to be extended beyond the conditions contained in the contract. The contract is the guide, and it must be followed, as to the making of changes and alterations. *Evans v. Graden*, 125 Mo. 72. The surety is the favorite of the law, and parties dealing with the principal, must live up to and abide with the strict terms of contract. The surety is liable only according to the strict letter of the contract. *Brookshier v. McIlwrath*, 112 Mo. App. 687; *Nofsinger v. Hartnett*, 84 Mo. 549. (2) There was no lien on the school building, and the plaintiff could not enforce any lien for material furnished. *Abercrombie v. Ely*, 60 Mo. 23; *State ex rel. v. Loomis*, 88 Mo. App. 500. Plaintiff cannot recover of the defendants (sureties) on said bond; because said bond was limited for the use and benefit of persons who would become entitled to liens. *State ex rel. v. Loomis*, 88 Mo. App. 500; *St. Louis v. Constructing Co.*, 202 Mo. 451; *Lumber Co. v. Banks*, 117 S. W. 611; *School District v. Green*, 134 Mo. App. 421; *Reissaus v. Whites*, 128 Mo. App. 135; *School District v. Boyle*, 182 Mo. 347; *School District v. Burris*, 84 Mo. App. 662.

Robert A. Anthony for respondent.

(1) Although relator is not mentioned in the bond given by appellants, yet under the condition thereof that Beggs, the principal, "shall duly and promptly pay and discharge all indebtedness that may be incurred by said J. F. Beggs in carrying out said contract," this action may be maintained. *Forge Co. v. Mfg. Co.*, 105 Mo. App. 484; *Lime & Cement Co. v. Wind*, 86 Mo. App. 163; *School District ex rel. v. Livers*, 147 Mo. 580; *St. Louis v. Von Phul*, 133 Mo. 569; *Devers v. Howard*, 144 Mo. 671. (2) This action was properly brought by the school district at the relation of the respondent to which the contractor, Beggs, became indebted "in carrying out said contract." *School District ex rel. v. Livers*, 147 Mo. 580; *R. S. 1899*, secs. 6761, 6762. (3) One of the purposes of sections 6761 and 6762, Revised Statutes 1899, is to give a right of action on the bond of a contractor to every person who would have the right, but for the intervention of public policy, to file and enforce a mechanic's lien. *Press Brick Co. v. School District*, 79 Mo. App. 665; *R. S. 1899*, secs. 6761, 6762. (4) Beggs' bond may be said to be official and voluntary, and is binding on the sureties although the exact language of the statute may not be used. A rigid compliance with the statute is not required. *State ex rel. v. O'Gorman*, 75 Mo. 370; *Henry County v. Salmon*, 201 Mo. 136. (5) Even if Beggs' bond should not be treated as a statutory bond, then it would still be good as a common law bond and can be enforced against the sureties, especially where the terms of the bond, as in this case, are not limited or restricted by the statute. *Hardware Co. v. Greve*, 18 Mo. App. 6. (6) On the question of statutory contractors' bonds, which do not completely comply with statutory requirements, the following foreign cases hold them still good as common law bonds. *Kiesig v. Allspaugh*, 91 Cal. 234; *Kiesig v. Allspaugh*, 99 Cal. 452;

Blyth v. Robinson, 104 Cal. 239; Robling v. Pike County, 141 Ind. 522; Wadsworth v. School District, 7 Wash. 485. (9) Where as in the case at bar the bond and contract were of the same date, each referring to the other, there was sufficient consideration for the bond. Oberbeck v. Mayer, 59 Mo. App. 295.

STATEMENT.—This is an action on a contractor's bond, to recover a debt for materials furnished to one J. F. Beggs, contractor, which were used in the construction of a public high school building at Fredericktown, Missouri. It is set out in the petition in the case that Beggs, before beginning the construction of the high school building and as part of his agreement with the school board, made his bond, the other defendants being his sureties, to the school district, whereby they bound themselves in the amount of the penalty of the bond to the school district, "as well as all persons who might become entitled to liens under the provisions of the foregoing described contract, or to whom the said J. F. Beggs might become indebted for labor performed on said building, or material furnished and which entered into its construction," the condition of the bond being that if said J. F. Beggs in all things stand to and abide by and well and truly keep and perform the covenants, etc., of the contract, "and should duly and promptly pay and discharge all indebtedness that might be incurred by the said Beggs in carrying out said contract, and complete the said building free of all mechanical liens, and should truly keep and perform the covenants, conditions and agreements in said contract contained on his part to be kept and performed at the time and in the manner and form therein specified," then the bond to be void; it being further provided in the bond that in case an action is brought under its provisions, to pay "all costs of such action, including attorneys' fees, which might be incurred in enforcing the payment and collection of any and all

indebtedness incurred by said Beggs in carrying out said contract," it being also provided and set out in the bond that "it is made for the use and benefit of all persons who may become entitled to liens under said contract, or to whom said Beggs might become indebted, and that it might be sued upon by such persons as if executed to them in proper person."

The petition then avers that after execution of the contract and bond, Beggs, as contractor, erected and completed the building and the school district paid him for it and accepted the building; that plaintiff, at request of Beggs, had furnished pressed brick to Beggs which were used by him in the construction of the building, of the total value of \$2139.06, and on which Beggs had paid \$1539.06, and that \$600 remained unpaid on account thereof, which Beggs had refused to pay, thereby breaching the bond. Judgment is accordingly asked for the penalty of the bond and execution for that amount and interest and costs and for a reasonable amount for attorneys' fees.

The answer of the sureties, after a general denial, admits the execution of the contract and bond as pleaded, and sets up departures from the contract, in the way of additions and alterations, etc., which it was claimed absolved the sureties from payment of the obligation of the bond. Beggs admitted in his answer an indebtedness of \$227.76 and no more.

The reply was a general denial.

The case was tried before the court, a jury being waived, and a judgment was rendered for the penalty of the bond and damages assessed at six hundred dollars, and an attorney's fee allowed for one hundred dollars.

The court was requested to make a finding of fact in the case which it did as follows, entering it of record as we gather from the abstract:

"The court finds the following facts in addition to those admitted in the pleadings:

"1st. That the defendant, J. F. Beggs, as principal, and the other defendants above named, as sureties, signed, executed and delivered the bond dated June 1, 1907, and offered in evidence.

"2d. That the defendant, J. F. Beggs, entered into the contract with the School District of Fredericktown, dated June 1, 1907, whereby he agreed to construct, build and complete the high school building for said district in accordance with the conditions set out in said contract, which said contract was offered in evidence.

"3d. That the defendant, J. F. Beggs, completed the building mentioned in the said contract, and was paid therefor in full by the said school district, in accordance with the contract.

"4th. That he purchased for and used in the erection of said building the material set out in the account filed by plaintiff and offered in evidence, at and for the price therein set out and agreed upon, and that there is still due and unpaid plaintiff, from defendant, for such material, the sum of \$600.

"5th. That the sum of one hundred (\$100) dollars, the court finds to be reasonable allowance for plaintiff's attorney's fee in this cause and that said fee is provided for in the bond offered in evidence."

Judgment was accordingly entered for the penalty of the bond, and awarding execution for six hundred dollars debt and one hundred dollars attorney's fee and costs, and from this defendants have appealed.

REYNOLDS, P. J. (after stating the facts).—The paper filed as an abstract is attacked by counsel for respondent as not being sufficient in any respect; among others, that it fails to show the filing of record of a bill of exceptions. An examination of this so-called abstract, while showing many defects not necessary to be noted or commented on here, although not very clearly set out, does show that the bill of exceptions was duly filed in vacation by the clerk and within

the time allowed. The bill of exceptions is referred to by written interlineations in the printed abstract, by pages, but the bill of exceptions is not before us. What are said to be entries of records showing overruling of motions, contains the recital that defendants excepted to the ruling. But exceptions cannot be saved by record entries. It is impossible to determine by the abstract furnished us what is in the bill of exceptions and so saved. Thus it is set out that a motion was filed to strike out certain portions of the answer, setting up alterations in the building which it is claimed absolved defendants from liability on the bond, and the motion is set out in full. Following that is this entry in the abstract, written by pen and ink: "Said motion to strike out is set forth on pages 2, 3, 4, 5 and 6 in bill of exceptions." Then follows this, printed: "That on the 30th day of September, 1908, the same being the third day of the September term, 1908, the court took up said motion to strike out part of the answer of the said defendants aforesaid, and having seen, heard and considered the same, did then and there sustain the said motion. To the ruling of the court in sustaining said motion to strike out part of said answer, the defendants then and there and at the time objected and excepted and saved their exceptions." Then follows, by pen and ink, this: "The rulings and objections and exceptions are set out in bill of exceptions." And so it runs through this abstract. It comprises forty pages and these pen and ink interlineations of matter which should appear in an abstract are on sixteen of them, sometimes two or more on a page. By these alone is an attempt made to inform us of what is exception and what of record. Respondent challenges the abstract as insufficient and asks for an affirmance or dismissal of the appeal on that ground. We will not sustain that motion, but even without it, examining the so-called abstract, we are left in the dark to say what is and is not in the bill of exceptions. Rule 15 of our court

clearly and unmistakably calls for a printed abstract in fair type. While an occasional interlineation or correction by pen or pencil will not be cause for dis-regarding an abstract, we cannot tolerate such radical departure from the rules established for the orderly conduct of cases. As to the bill of exceptions, this entry, however, does appear: That the "court granted to the defendants until the 1st day of January, 1909, in which to file their bill of exceptions and in vacation of this court, and that execution be stayed pending the appeal." Then appears this: "That afterwards, and on the 22d of December, 1908, the defendants filed their bill of exceptions, with the clerk and in vacation of the circuit court of Madison county, Missouri, and the following entry of record was made, to-wit:" Then follows the entry of filing.

We have set out the finding of facts made by the court. It sustains all the material allegations in the petition.

The sole question which we consider necessary to consider at any length is the question of the sufficiency of the petition to sustain the judgment. Recurring to the objections made to the petition, it is urged that the bond there set up and pleaded does not include this plaintiff, he not being named in it, not being within its terms, but a stranger to it; that the bond is limited by its terms and scope to those who have a right to mechanics' liens, and as there can be no mechanics' liens against a public school building, it does not protect that class of claimants, of whom plaintiff is one; that no one but the school district itself is under protection of the bond; that "the clear and unequivocal wording of the bond in question is that it was made for the benefit of those and only those who might, under the statute, become entitled to liens." Section 6761, Revised Statutes 1899, provides:

"All . . . school districts making contracts for public work of any kind to be done for such

. . . school district, shall require every contractor to execute a bond with good and sufficient securities, and such bond among other conditions shall be conditioned for the payment for all material used in such work, and all labor performed on such work, whether by subcontract or otherwise."

We have set out the conditions of the bond as pleaded in the petition. It is not necessary to repeat them here. Over and beyond the obligation to pay for all material, etc., furnished Beggs in the construction of the building, is the distinct clause that the bond "*is made for the use and benefit of all persons who may become entitled to liens under said contract, or to whom said Beggs might become indebted and that it might be sued upon by such persons as if executed to them in proper person.*" It is true that this clause is not in the language of section 6761, but while rather awkwardly expressed, it effectually covers the idea of that section. Discarding the statute, it is a good common-law bond, and very clearly sets out those who are to be within its protection. Nor is the expression in it, that those who may be entitled to mechanics' liens are within it, to be taken literally, for no one can be entitled to a mechanics' lien against a public building. Hence this clause might be read as if in these words: "Those who but for the provisions of the law exempting public buildings from mechanics' liens are entitled to enforce a lien." But this bond, as pleaded, does not end with this provision as to protection of mechanics' lien claimants. It protects these as well as those "to whom the said J. F. Beggs might become indebted for labor performed on said building or materials furnished and which entered into its construction." It is made for the use and benefit of "all persons who may become entitled to liens"—that is one class; "or, to whom said Beggs may become indebted," and that is another class; then, covering both, it provides, "it might be sued upon by such persons, as if executed to

them in proper person." Herein this bond differs radically from the bond in suit in *State ex rel. v. Loomis*, 88 Mo. App. 500, and instead of falling under the condemnation of that decision, this case is directly within the general doctrine there announced, namely, contracts for the benefit of third parties may be enforced by them, even if not named in them, provided it appears that the third parties were within the minds of the parties to the bond as parties within its protection. Judge GOODE (l. c. 504) expressly says, referring to the bond there before the court, "The language does not embrace all who might perform labor or furnish material, but only such as do one of those things and are entitled to a lien therefor. In that respect the contract differs from those construed in *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863; *City ex rel. v. Von Phul*, 133 Mo. 561, 34 S. W. 843; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *School District ex rel. v. Livers*, 147 Mo. 580, 49 S. W. 507; *Luthy v. Woods*, 6 Mo. App. 67, in which cases the contracts were so worded as to protect laborers and materialmen without the qualification that they should be lienors." The bond before us in this case does provide both for lienors and for all others who do work and furnish material. Hence it is within the rule laid down in the *Loomis* case and distinctly within the cases there cited.

As is said in the *Luthy* case, it is not necessary to resort to any supposed equity even to entitle the materialmen to sue. Their right arises from the very terms of the bond; the bond and its condition are pleaded; the plaintiff is within not alone its spirit, but its very terms. If necessary to go that far, we would be inclined to hold it good even under the statute.

We conclude, therefore, that the petition here does state a good cause of action and the finding and judgment of the trial court are fully sustained by it. Judgment affirmed. All concur.

**SCHOOL DISTRICT OF FREDERICKTOWN ex rel.
FREDERICKTOWN LUMBER COMPANY, Re-
spondent, v. J. F. BEGGS et al., Appellants.**

**St. Louis Court of Appeals. Submitted on Briefs, February 7, 1910.
Opinion Filed February 21, 1910.**

**SCHOOL DISTRICT OF FREDERICKTOWN EX REL. V. BEGGS,
ANTE, FOLLOWED.**

**Appeal from Madison Circuit Court.—*Hon. Chas. A.
Killian, Judge.***

AFFIRMED.

Tesreau & Chitwood for appellant.

Rob't A. Anthony for respondent.

REYNOLDS, P. J.—The facts of the case, save as to amount and relator, and the condition of the record in this case, are identical with those in No. 11,781, School District of Fredericktown ex rel. Fredericktown Brick Co. v. J. F. Beggs et al

For the reasons there stated, the judgment in this case is affirmed. All concur.

BEYER-KNOX COMPANY, Appellant, v. JOHN F. EWELL, Respondent.

St. Louis Court of Appeals. Argued and Submitted February 9, 1910. Opinion Filed February 21, 1910.

1. **APPELLATE PRACTICE: Replevin: Judgment: Failure to Confirm Plaintiff's Right of Possession: Harmless Error.** In an action of replevin to recover the possession of lumber and logs, where the jury found plaintiff was entitled to the possession of the lumber, without awarding him any damages for its detention, and defendant was entitled to the possession of the logs and that he was damaged by their taking in a certain sum, a judgment merely awarding defendant the damages assessed and costs will not, on plaintiff's appeal, be reversed for failing to confirm his right of possession of the lumber, such failure involving no substantial right of plaintiff.
2. **JURISDICTION: Appellate Jurisdiction: Final Judgment: Based on Counterclaim: Defective Petition.** Where defendant set up a good cause of action against plaintiff on a counterclaim, and issue was joined thereon, and the verdict and judgment appealed from were principally on the counterclaim, and the judgment for defendant was a final judgment, the court on appeal had jurisdiction, though the petition did not state a cause of action.
3. **APPELLATE PRACTICE: Conclusiveness of Verdict.** A verdict supported by substantial evidence will not be disturbed on appeal.
4. **COSTS: Taxation of, Discretionary.** Where, in an action for the possession of lumber and logs, and damages for their detention, defendant answered by a general denial and a claim for damages for the taking by plaintiff, and the jury found that plaintiff was entitled to the possession of the lumber, and that defendant was entitled to the possession of the logs and to damages for their taking, the court did not err in assessing all the costs against plaintiff, though it might have divided them, the imposition of costs being to some extent a matter of discretion with the trial court.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley, Judge.*

AFFIRMED.

Reeves & Hawkins and B. L. Guffy for appellant.

(1) The material issues presented in the pleadings were the right to the possession of a certain lot of lumber and logs and the damages asked by both the plaintiff and the defendant. The judgment did not dispose of the issue as to plaintiff's damages, nor as to the right of either party to the possession of the lumber or logs, but only determined the issue as to the defendant's claim for damages. The judgment was therefore not responsive to the issues presented by the pleadings and was for that reason erroneous. R. S. 1899, sec. 4476; *Caldwell v. Ryan*, 210 Mo. 17; *Schneider v. Patten*, 175 Mo. 684; *Martin v. Tobacco Co.*, 53 Mo. App. 655; *Bothe v. Loy*, 83 Mo. App. 601. (2) The verdict was for the plaintiff for the lumber, and for defendant for the logs and damages for the taking and detention thereof, but the judgment did not make any adjudication as to the rights of the parties to the lumber or the logs in accordance with the verdict, and was erroneous for that reason. The judgment did not follow the verdict. R. S. 1899, sec. 4476; *Hackworth v. Zeitinger*, 48 Mo. App. 32; *Coleman v. Hicks*, 158 Mo. 367. (3) This was a replevin suit and the verdict of the jury was for the plaintiff for a part of the property, yet the judgment was rendered against the plaintiff for the costs of suit. This was error. The judgment should have been against the defendant for the costs instead of against the plaintiff. R. S. 1899, sec. 1552; *Lamm v. Bailey*, 127 Mo. App. 726; *Hecht v. Heimann*, 81 Mo. App. 370. (4) It is not necessary or proper in this case for the plaintiff to file a motion to retax the costs. It is only necessary to file such motion in cases where, after judgment, the clerk within the purview of the judgment improperly performs the ministerial function of taxing the costs. The costs in this case were specifically adjudged against the plaintiff and plaintiff's attack on the judgment in his motion in arrest

was sufficient to bring this error here for review. *Mann v. Warner*, 22 Mo. App. 577; *Bosley v. Parle*, 35 Mo. App. 232; *Paul v. Machine Co.*, 87 Mo. App. 647; *Winn v. Modern Woodmen of America*, 123 S. W. 59; *State ex rel. v. Railroad*, 78 Mo. 575; *State ex rel v. Railroad*, 176 Mo. 443; *Berberet v. Berberet*, 136 Mo. 671; *Jackson v. Railroad*, 89 Mo. 104.

Ward & Collins for respondent.

REYNOLDS, P. J.—Action by plaintiff for the recovery of possession of certain lumber and logs valued at one thousand dollars, to which it claims the right of possession, and damages for their unlawful detention, laid at five hundred dollars. Under the writ issued in the case, possession of the property involved was taken from the defendant and turned over to plaintiff. In addition to a general denial, plaintiff set up in his answer a claim for damages for the taking, in the sum of two thousand, five hundred dollars.

The reply was a general denial.

The cause was submitted to the court and jury, and the latter returned a verdict which was embodied in the judgment entered in the case, the latter as follows, after the title of the cause.

“Comes now the parties by their respective attorneys, then comes the jury heretofore impanelled to try this cause, both again announce ready to proceed with this trial of this cause, and the further trial of this cause proceeds. And the jury having heard all the evidence, instructions of the court and argument of counsel retire to consider their verdict. And now on this same day comes the jury into open court and upon their oaths return the following verdict: ‘We, the jury, find that at the time of the institution of this suit, the plaintiff was entitled to the possession of the oak lumber estimated at 25,800 feet sued for and that the same is of value of — dollars and that for the taking and

detention the plaintiff is damaged in the sum of — dollars. And we do further find that at the time of the institution of this suit the defendant was entitled to the possession of the oak logs sued for and the same is the value of — dollars, and that the defendant has been damaged in the sum of \$485.55. O. R. Cole,' which verdict is by the court ordered recorded. It is therefore considered and adjudged by the court that the defendant have and recover of and from the plaintiff the sum of \$485.55, his damages as assessed by the jury, together with the costs of this suit and hereof have execution therefor."

In due time plaintiff filed motion for new trial as also in arrest, both of which were overruled, exceptions saved, and appeal duly prayed for and granted and perfected to this court.

Complaint is made by the appellant of the form of the judgment as not following the verdict; of the verdict as not disposing of the issues in the case so far as concerns plaintiff; of the verdict in favor of the defendant, as not warranted by the evidence, and of that part of the judgment taxing costs of the suit against the plaintiff. It must be admitted that the judgment is defective in form, in that it should have been entered awarding or confirming in plaintiff right of possession to the 25,800 feet of oak lumber. If we were to reverse and remand for this, it would have to be accompanied by direction to the court to enter up a proper judgment on the verdict, and would affect the case no further, so far as concerns plaintiff, than does the present judgment. We might even dismiss the appeal for lack of a final judgment on plaintiff's cause of action. The party who has some substantial claim to complain of the form of judgment is the defendant, as it might well be contended by him that the judgment is not of such character as to bar another action against him for the same cause. But defendant is not complaining nor appealing, and as no substantial right of the plain-

tiff is involved, we decline to consider this clerical error in the rendition of the judgment, for that is all it is in reality, as cause either for reversal or dismissal of the appeal as to that part of it, even assuming that we could split up a judgment. That judgment is appealable, however, on another aspect, which is this: It is suggested that the petition is defective in that it fails to set up a general or special title to the logs and lumber in plaintiff. That suggestion comes from the defendant, respondent here, and is met by appellant with the concession that the petition is defective, but that the respondent cannot raise the question in this court, he not having filed a motion for a new trial or in arrest of judgment and has not appealed. The answer of the respondent to this is that it has always been the rule in the appellate courts, even without a motion in arrest, to examine into the sufficiency of the petition. It is sufficient to say as to all this, that even if it is true that the petition does not state a good cause of action, the defendant below, respondent here, in and by his answer, has set up a good cause of action against the plaintiff on his counterclaim and issue was joined on that and the verdict and judgment appealed from are principally on that counterclaim, and that judgment for respondent is a final judgment on which an appeal can rest, and vests this court with jurisdiction over the appeal.

An examination of the testimony offered and introduced at the trial of the case, as exhibited in the somewhat voluminous abstract, satisfies us that the result arrived at in the trial court is substantially correct. It would serve no useful purpose to go over the testimony, the objections to it and the manifold arguments of counsel on the various questions which arose at the trial. We cannot see that they are questions, the determination of which would be important in the consideration of any other case, and unless that be so, we see no useful purpose to be subserved by ruling on

the propositions. We pass them by without any disparagement of the learning and industry displayed by counsel in their thorough discussion of the many questions presented by them. We find no error of the learned trial court in giving or refusing instructions or ruling on the admission of testimony materially affecting the plaintiff or to the manifest prejudice of its rights. It is the very common case of a dispute over the performance of a contract between the sawmill man and the lumberman, a class of cases that have been threshed out time out of mind—a case for a jury, its solution depending on the view the jury takes of the evidence. The jury had before it substantial evidence to find as they did; they are the arbitrators where the evidence is conflicting, and we see no reason to disturb their verdict.

The point made, that the costs should have been taxed against the defendant instead of against the plaintiff, is not well taken. The imposition of costs is to some extent a matter of discretion with the trial court, and while in this case it might have divided the costs under the verdict rendered, as it has seen proper to assess them against the plaintiff, we see no reason strong enough to warrant us in interfering with its action. The judgment of the circuit court is affirmed. All concur.

**PEMISCOT LAND & COOPERAGE CO., Appellant, v.
E. L. DAVIS et al., Respondents.**

**St. Louis Court of Appeals. Argued and Submitted February 9,
1910. Opinion Filed February 21, 1910.**

1. **APPELLATE PRACTICE: Overruling Challenge of Juror: Necessity of Calling Attention to Error in Motion for New Trial.** The error in overruling a challenge of a juror will not be considered on appeal, where the point was not saved by motion for new trial and where it does not appear the juror was on the panel selected to try the case.
2. **JURORS: Competency: Relationship to Parties: Affinity.** Section 3785, Revised Statutes 1899, forbidding the impaneling of a juror of kin to either party within the fourth degree of consanguinity or affinity, disqualifies a juror who is a second cousin of the wife of one of the parties, because he is within the fourth degree of "affinity," which is the relationship by marriage between a husband and his wife's blood relations or between a wife and her husband's blood relations.
3. **STATUTE OF LIMITATIONS: Trespass to Real Estate: Burden of Proof.** Where, in an action for single damages for trespass by cutting and removing timber, the total amount of the timber cut and removed and the value thereof were proved, the burden was on defendant, relying on the five-year Statute of Limitations (section 4273, Revised Statutes 1899), to show what timber was cut prior to the five years before the bringing of the action and the value thereof, so that such value could be deducted from the value of all timber cut and removed.
4. **———: Burden of Proof.** A defendant who pleads the Statute of Limitations has the burden of bringing himself within the statute; and this burden rests on him throughout all the incidents involved in the plea.

**Appeal from Pemiscot Circuit Court.—Hon. Henry C.
Riley, Judge.**

REVERSED AND REMANDED.

Ward & Collins for appellant.

(1) The court erred in failing to excuse juror Robert Popham. Sec. 3785, R. S. 1899; *Mahaney v. Railroad*, 108 Mo. 191; *State v. Walton*, 74 Mo. 285. (2) The verdict was for nominal damages and under the law and evidence in this case there was no nominal damage in the case. 8 Am. and Eng. Ency. of Law (2 Ed.), p. 542; *Bouvier's Law Dictionary*, "Damage;" *Black's Law Dictionary*, "Nominal Damages." As if where plaintiff proved damages but failed to prove the amount, he is entitled to nominal damages. *Brown v. Emerson*, 18 Mo. 103; *Owens v. O'Riley*, 20 Mo. 603; *Hayes v. Delzell*, 21 Mo. App. 679; *Breen v. Fairbank*, 35 Mo. App. 212. But that is not the case here, for the defendants admit that they cut the timber on this land, and sale bill shows it; the man who cut the timber swears, and both defendants who testify state, that they got the timber. (3) The court erred in its instructions numbers 1, 2, 3 and 4 for respondents. (a) "The Five Years' Statute of Limitations to be a defense to defendants must be by them pleaded." *Stoddard Co. v. Malone*, 115 Mo. 508; *Murphy v. DeFrance*, 105 Mo. 53; *Bell v. Clark*, 30 Mo. App. 224. (b) "The burden of showing exemption from the operation of the Statute of Limitations is upon the party claiming the exemptions." *Campbell v. Laclede Gas Co.*, 84 Mo. 352; *Knoche v. Whitman*, 86 Mo. App. 568; *Feurt v. Ambrose*, 34 Mo. App. 360; 19 Am. and Eng. Ency. of Law, (2 Ed.), 332; *Combes v. Smith*, 78 Mo. 32, l. c. 40-41; *Gray's Arbor Com. Co. v. Bank*, 74 Mo. App. 633; *St. Louis Tow Co. v. Ins. Co.*, 52 Mo. 529. (c) "In a case of continuous trespass, the action is barred as to so much of the wrong only as was committed prior to the term of the limitations." *Graft v. City of St. Louis*, 8 Mo. App. 562.

J. R. Brewer for respondents.

(1) Even if the court committed error in not sustaining appellant's challenge to the juror, Robert Popham, yet as it raises no such question in its motion for a new trial this court cannot consider it. *R. S.* 1899, Sec. 640; *State v. Tomasitz*, 144 Mo. 91; *Lynch v. Railroad*, 208 Mo. 42. (2) Defendants by the general denial plead in this case put in issue among other things the amount of damages sustained by the plaintiff and it was incumbent on it to prove the amount. *Hayes v. Delzell*, 21 Mo. App. 684; *Breen v. Fairbank & Co.*, 35 Mo. App. 216; *Webb v. Coonce*, 11 Mo. 9. Defendant's plea of the Statute of Limitations is not inconsistent with their general denial for they both may be true and the one does not contradict the other. *Enos v. Railroad*, 41 Mo. App. 268.

STATEMENT.—Action by plaintiff, appellant, here, against respondents for \$500 damages claimed to be due for trespass on lands of plaintiff, cutting and removing therefrom a lot of timber and converting the timber to the respondents' use. The action was commenced in the circuit court of Pemiscot county, on the 25th day of April, 1907.

The answer is a general denial and the plea of the five years Statute of Limitations (section 4273, *R. S.* 1899), single damages alone being demanded, not the treble damages recoverable under section 4572, under which latter the three years limitation would apply. Trial before court and jury. When the jurors were being examined upon *voir dire*, one of the jurors stated that he was a second cousin to the wife of one of the defendants. He was challenged for cause by the plaintiff, the challenge overruled and exception saved.

There was evidence in the case tending to show that while neither plaintiff nor defendants were in possession of the land, the legal title was in plaintiff. There

was also evidence tending to show that the defendants were claiming under a bill of sale for the timber, made to them by one Davis, on the 22d of May, 1901, who claimed by virtue of a tax deed of date September 9, 1897, the suit under which the sale was had and the deed made being against two parties, neither of whom appear to have had any title to the land at the date of the suit. There was evidence on behalf of plaintiff to the effect that the timber had been cut and taken from the land by parties acting under order of the defendants not over three years before the beginning of the suit. There was also evidence tending to show the number of feet cut and its value, somewhere around \$150. A witness for plaintiff testified that he had cut this timber off of the land, of which the land in controversy was a part; that to the best of his recollection the last of the timber was cut and removed from the land in July, 1902. A witness for defendants testified in direct examination, that none of the timber was cut later than April 25, 1902, but on cross-examination, he admitted that he did not know when the last was cut and whether the last that was cut, was cut off of the land in controversy; that he paid no attention to dates; could not say exactly when they finished cutting on the land in controversy; could not say in what month in 1902 the timber cutters got through cutting on this land; could not say that it was not in the month of July, 1902; that what he means to say was that the last that was cut was in July, 1902, but whether that cutting was off of this land or not, he would not undertake to say. He further testified that he did not know and was not willing to say whether any timber was cut off of this land before the 25th of April, 1902, or not. One of the defendants testifying, said in effect that he would not say that the timber which had been cut off this land had been cut off and removed before the 25th of April, 1902. In brief, while the testimony tended to show timber had been cut off this land after April 25, 1902, it did not

show just how much of that cut and removed from the tract had been after that date; that is, it did not definitely show how much had been cut and removed within the five years, nor how much before the beginning of the five-years period.

At the conclusion of the testimony, the court, at the instance of plaintiff, gave four instructions. The first was to the effect that under the evidence in the case neither of the defendants had any title to the land described in the petition nor any right or title to the timber on the land, and that the deeds and contracts read in evidence gave to plaintiff the right to sue and recover for any and all timber removed from the land by these defendants or either of them, or their agents or servants or employees, within the five years immediately prior to April 25, 1907, the date of which this action was begun, and if the jury found from the evidence that the defendants, through their agents or employees or in person, entered upon the land and cut and removed the timber within five years immediately prior to April 25, 1907, and converted the same to their own use and benefit, the jury would find the issues for the plaintiff, "in whatever sum you may find it to have been damaged by reason of the conversion of the timber as aforesaid, and assess its damages in a sum not exceeding \$500." In the second instruction given at the instance of plaintiff, the jury were told, in substance, that if they found for plaintiff they would, in assessing its damages, take into consideration the amount of timber taken from the land by one of the defendants (Reynolds) or his agents, within five years next prior to April 27, 1907, and upon this amount of timber the jury would compute its damage, by taking the market value of the timber at that time and place and allowing the plaintiff such sum as the jury would find to have been the reasonable market value of the timber at that time and place, not exceeding five hundred dollars. The third instruction given at the instance of plaintiff was

as to the bar of the Statute of Limitations plead by the defendants, and as to that the court instructed the jury that the burthen of proving that the cause of action accrued more than five years before the commencement of the action, rests upon the defendants, and that unless the defendants "prove to you by the preponderance or greater weight of evidence that the timber they removed from the land was removed more than five years before the institution of this action, then such defense will not avail, and you will find for the plaintiff." By the fourth instruction given at the instance of plaintiff, the jury were told that if they found the issues for plaintiff, they could find against both the defendants or against either, but if they found against one alone they must specify that one in their verdict.

At the instance of the defendant the court also gave four instructions. The first told the jury that nominal damages, as used in the instructions, is defined to be damages ranging from one cent to one dollar, but no more or greater sum. The second told the jury that they could not find for plaintiff for any timber cut or converted prior to the 25th of April, 1902. The third instruction told the jury, in substance, that although they might find and believe from the evidence that the defendants, or either of them, have, since the 25th of April, 1902, cut timber from the lands described in the petition, "yet before you can find for the plaintiff for more than nominal damages, you must find, by a greater weight or preponderance of the testimony, the amount of timber so cut by the defendants, or either of them, since said 25th day of April, 1902, and the value thereof." The fourth instruction told the jury that although they might find from the evidence in the case that the defendants cut or caused to be cut, timber off of the lands since the 25th of April, 1902, they could not find for plaintiff for more than nominal damages, "unless the quantity of timber cut and the reasonable market value

of the said timber so cut since the said date has been shown by the evidence in this case."

The plaintiff duly excepted to the giving of these instructions. Nine of the jurors returned a verdict for plaintiff and assessed its damages at the sum of one dollar. Judgment followed accordingly, a motion for new trial was filed, which was overruled, exceptions being saved, and an appeal duly perfected to this court by the plaintiff.

REYNOLDS, P. J. (after stating the facts).—Counsel for plaintiff assigned three grounds of error: First, to the failure to excuse the juror, who was challenged; second, that the verdict was for nominal damages, while under the law and evidence in the case, there could be no verdict for nominal damages, and third, that the court erred in its instruction given at the instance of the respondents. Referring to the first error assigned, as to the failure to sustain the challenge to the juror, it is to be said that this point was not presented or saved by the motion for new trial; that it does not appear that the juror challenged was of the panel that was selected to try the case or whether he was peremptorily challenged by the respondents, so that this assignment of error cannot be considered. Although it is true that the contention of the respondents is correct, and that under section 3785, Revised Statutes 1899, the challenge should have been sustained, we cannot reverse for this error for the reasons above stated. We notice it, however, so that on a new trial, like error may not creep into the record. Section 3785 forbids the impaneling of a juror in the trial of any case who, among other disqualifications, "is of kin to either party to any such cause within the fourth degree of consanguinity or affinity." The juror challenged stated that he was a second cousin to the wife of one of the defendants. That brought him within the degree of affinity, though not of consan-

guinity, prescribed by the statute. One is within the prescribed degree of affinity when the "relationship is by marriage between a husband and his wife's blood relations, or between a wife and her husband's blood relations" (Webster's New International Dictionary, Ed. 1910), and this juror should have been excused. Whether or not he was of the panel that tried the case, we are not advised nor, as before stated, can we reverse for this error, as it is not within the grounds stated in the motion for a new trial.

The second and third points may properly be considered together. They both go to the assigned error in the instructions which resulted in the verdict for nominal damages. If those instructions were proper under the law and the facts in evidence in the case, the verdict cannot be successfully attacked. The jury must have understood by the instructions given at the instance of the defendant, that the court threw upon the plaintiff here the burthen of establishing the amount of actual damages sustained by reason of the cutting and taking away of the timber, within the five years immediately prior to the institution of the action. That was error. The issues in the case are very simple and are well stated by counsel for the respondents to be, first, was plaintiff entitled to recover for this timber which was practically admitted by the respondents to have been cut and removed by them? That brought it down to a question of the amount and value of the timber cut. Second: that was clearly established by the evidence and made out a *prima facie* case for the plaintiff. For the court to instruct, in contravention to this *prima facie* case, that the burthen of proof was upon the plaintiff to show what was the value of the timber cut within the period of the statute, was practically shifting this burthen from the plaintiff to the defendants. It was for the defendants to show how much of the timber cut was cut prior to the 25th day of April, 1902; it was for the defendants to take the amount of cutting claimed to

have been done prior to the beginning of the running of the statute, out of the statutory period and out of the whole amount of cutting proven to have been done. When the total amount of timber which had been cut off of this land and the total value of that timber had been proven, the burthen was on the defendant to exclude from this amount the quantity and value of that cut prior to the 25th of April, 1902. Any other rule deprived plaintiff of the benefit of the instructions the court gave at its instance and contradicted those instructions. The court by these instructions which it gave at the instance of defendants, shifted the burthen from defendants to the plaintiff. This violated the rule that the burthen of showing exemptions by reason of the operation of the Statute of Limitations is always upon the party claiming the benefit of it, and that burthen rests there throughout all the incidents involved in the plea of the statute. In other words, the burthen is upon the defendants, who plead the statute, to bring themselves within the protection of the statute, not only as to the act but also as to what might be called the concomitant of the act. Defendants must show how much of all the timber cut and removed, was cut and removed before the beginning of the operation of the statute, and this necessarily involved showing the value of that so cut, that its value might be deducted from the value of all cut and removed. This was for defendants to do, not for plaintiff. When plaintiff proved the value of all cut and removed, it went as far as it was required to go. That, as we understand, is the law of this State as laid down in the cases of *St. Louis Tow Co. v. Insurance Co.*, 52 Mo. 529; *Combs v. Smith*, 78 Mo. 32; *Campbell v. Laclede Gas Co.*, 84 Mo. 352, l. c. 375; *Feurt, Ex'r. v. Ambrose*, 34 Mo. App. 360, l. c. 366; *Knoche v. White-man*, 86 Mo. App. 568, l. c. 571.

To slightly paraphrase the language of Judge ELLISON, in this last cited case, to meet the facts in this case, the essential point to be proven by the defendants

under their plea of the statute, was, that admitting they had cut and removed timber from the lands, they claimed as to part of it, in fact the larger part of it, that it was done prior to the beginning of the five-years period. In that was involved showing how much was cut and removed prior to the five years, and in that was further involved, proof of its value. That was the evidence defendants were required to produce, and the burden of making that proof was on defendants.

To repeat, the effect of the instructions which the court gave at the instance of respondents was to shift the burthen of proof from the shoulders of the respondents to the shoulders of the plaintiff as to the amount and value of timber cut prior to April 1, 1902, while it was for the defendants, pleading the statute, to show, by the preponderance of the evidence, how much of the timber cut fell outside of that period; that done, the plaintiff was entitled, not to nominal damages, but to damages for the difference between the value of all the timber cut and the value of that cut before April 1, 1902. If defendants failed to establish this by the preponderance of the evidence, that was their misfortune, and plaintiff would be entitled to a verdict for the value of all the timber proved to have been cut and converted. This error of shifting the burthen of proof appears throughout the three instructions given at the instance of defendants and is an error to the manifest prejudice and injury of the plaintiff. Apart from that, and the error in overruling the challenge to the juror, we find no error in the record. For the error in instructions, which we have pointed out, the judgment of the circuit court is reversed and the cause remanded. All concur.

**GREENBRIER DISTILLERY COMPANY, Appellant,
v. PHILIP R. VAN FRANK, Respondent.**

St. Louis Court of Appeals, February 21, 1910.

1. **EVIDENCE: Presumptions: Receipt of Mail Matter: Rebutting Presumption.** In an action for liquor sold and delivered, it was not error warranting a new trial to exclude testimony that defendant's agent and manager of his hotel had all letters brought to him, that he withheld those he did not wish defendant to see, putting them in his pocket, as tending to rebut the presumption that letters mailed, properly addressed to defendant, had not been delivered, since it did not show what letters were withheld, nor to what matters those withheld related, and the evidence was, therefore, incompetent as too general and indefinite.
2. ———: ———: **Receipt of Telegram: Rebutting Presumption: Harmless Error.** In an action for liquor sold and delivered, testimony that defendant's agent and manager of his hotel directed that all telegrams going into the hotel be brought to him, as bearing on the issue that he suppressed plaintiff's telegram to defendant, might properly have been admitted, but its exclusion was not sufficient to warrant a new trial.
3. **CORPORATIONS: Foreign Corporations: Selling Through Drummers: License.** A foreign corporation, selling to a customer in this State through a traveling agent, is not required to take out a license to do business in this State.
4. **INSTRUCTIONS: Singling Out and Commenting on Evidence.** An instruction which singles out particular evidence and comments on that alone to the exclusion of the other evidence in the case is erroneous.
5. **PRINCIPAL AND AGENT: Instructions: Evidence: Direct Evidence not Essential to Prove Agency.** In an action for liquor sold and delivered through an order given by defendant's agent, an instruction asked by defendant to the effect there was no evidence that defendant gave direct authority, employed, appointed or constituted the person who gave the order as agent to buy the liquor, was properly refused, as it would have tended to confuse the jury and unwarrantably turned their attention to the fact that direct evidence should have been given of authority to constitute agency, which is not the law.

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6. ———: ———: ———: ———: Authority of Agent. In an action for liquor sold and delivered through an order given by defendant's agent, where defendant denied the authority of the agent, an instruction that agency need not be established by direct and positive proof, but may be established by circumstantial evidence, and that if the jury believed from all the facts and circumstances in evidence the alleged agent was the agent of defendant and had authority to purchase the goods in the name and on the credit of defendant, then plaintiff is entitled to recover, was a correct declaration of law.
7. ———: ———: Authority of Agent: False Representations of Agent. In an action for liquor sold and delivered through an order given by defendant's agent, a requested instruction that if the jury believed the alleged agent falsely and fraudulently represented to plaintiff he was defendant's agent, with the intention of converting the goods ordered to his own use, and that the sale was made by plaintiff by reason of reliance on such false statements, then the jury should find for defendant, was an incorrect statement of the law applicable to the case and was properly refused as not being within the issues of the case.
8. ———: Evidence: Circumstances to Prove Agency. In an action for liquor claimed to have been purchased by defendant's agent for defendant, the fact that city and federal licenses were standing in defendant's name was a circumstance proper for consideration in connection with the other evidence on the issue of agency.
9. TRIAL PRACTICE: Change of Theory: Instructions: Refusal of Instructions Covering Opponent's Abandoned Theory. In an action for liquor claimed to have been purchased by defendant's agent for defendant, where plaintiff abandoned the theories urged at a former trial that defendant had ratified the sale and was estopped to deny the agent's authority, and elected to rely on the theory that the agent had the right to make the purchase in defendant's name, it was proper to refuse a charge on the issues of ratification and estoppel, although the court on appeal from the judgment in the former trial, directed that all these issues be submitted to the jury.

Appeal from Jefferson Circuit Court.—*Hon. Jos. J. Williams*, Judge.

REVERSED AND REMANDED (*with directions*.)'

R. H. Whitelaw and *Wilson Cramer* for appellant.

Robert L. Wilson for respondent.

REYNOLDS, P. J.—Under the title of Hackett et al. v. Van Frank, this case has been before this court on two previous appeals. The first time on the appeal of defendants, reported 105 Mo. App. 384, 79 S. W. 1013. In the opinion in that case, which was rendered by Judge GOODE, it was said (l. c. 400): "The case should be submitted to the jury to decide these issues. First, whether Dunlop had authority to make the purchases in Van Frank's name. If he had actual authority, the liability of the defendant follows without reference to any other issue. Second, whether, if he did not have authority at the time they were made, the defendant afterwards learned they had been made in his name and acquiesced in Dunlop's action, thereby ratifying it. In either of those two contingencies the jury are not concerned with the question of estoppel. Third, if Dunlop's acts are found to have been neither authorized nor ratified by the defendant, whether the latter's behavior when he got the telegram induced Sugg to believe Dunlop had acted with authority and so believing, to make the sale on December 6th. We are thus explicit because this is a case in which there is much danger of an unjust result, unless it is tried cautiously and the jury's attention drawn directly to the facts by close instructions. Abstract announcements of legal principles should be avoided."

On the second appeal, which was by the plaintiff, the court had refused to allow the amendment of the names of the parties plaintiff from the name of the partners to that of the corporation under which it appears they were doing business at the time the sale is alleged to have been made to the defendant. That case is reported 119 Mo. App. 648, 96 S. W. 247, when this court held that the amendment should have been allowed. The venue of the case was again changed and it was finally tried in Jefferson county and resulted in a verdict in favor of the plaintiff for the full amount claimed as the value of certain barrels of whiskey alleged to have

been sold by plaintiff to the defendant. On a motion for a new trial which the defendant filed, the trial court sustained the motion and granted a new trial for the reason assigned, "that the court excluded and refused to permit the defendant to read in evidence to the jury on the trial of the cause the following portion of the deposition of Joe C. Lind, namely:

" 'I will ask you if you know anything of Frank Dunlop withholding from Col. Van Frank letters or other mail matter, that would come through the post-office addressed to Col. Van Frank? A. Yes, sir.

" 'Q. How often would that occur? A. As often as he would see a letter that he would think he didn't want the Colonel to see.

" 'Q. Do you know what Dunlop would do with these letters? A. No, sir; he would put them in his coat pocket when I would hand them to him. I had instructions from Dunlop to bring mail for everybody at the hotel; to bring mail to him first, positively.' "

"And because the court further erred on the trial of the cause in refusing to permit the defendant to ask of the witness Cochran the following question, namely:

" 'Q. Did you ever have any arrangements with Mr. Dunlop by which messages that go into the hotel were to be delivered to him?' "

Whereupon plaintiff appealed, the error assigned being that the circuit court erred in sustaining the defendant's motion for a new trial and in granting him a new trial. The defendant, resisting the appeal, contends that there not only was no error in granting the new trial for the reasons stated by the trial court, but that outside of the reasons assigned by the trial court, a new trial should have been awarded for error of the court in refusing instructions he asked, numbered 5, 6, 7, 8, 9, 10, and an instruction not numbered but which we number 11.

The facts in the case so far as necessary to an understanding of it are set out in the report of the case in

the 105 Mo. App. before referred to. Beyond that we only consider it necessary to a full understanding of the case as now before us to set out the instructions which were given and refused.

At the instance of the plaintiff the court gave three instructions as follows:

"1. The court instructs the jury that it is admitted in the pleadings that the Greenbrier Distillery Company, the plaintiff in this cause, is a corporation organized and existing under the laws of the State of Kentucky; and you are further instructed that, as such foreign corporation, it has the right under the laws of the State of Missouri to sell goods in Missouri through its traveling salesmen or drummers, even though it has not filed with the Secretary of State of the State of Missouri a copy of its charter or articles of association.

"And you are further instructed that, if you shall find from the evidence in this cause that plaintiff was not carrying on its business in the State of Missouri otherwise than by soliciting trade and selling its goods through its traveling salesmen or drummers, and that the merchandise now herein sued for was sold by plaintiff to defendant, or his agent, on orders taken by its traveling salesmen or drummer at Cape Girardeau, Missouri, and that the same was delivered to him, or his agent, and has not been paid for, then plaintiff is entitled to recover, and your verdict should be for the plaintiff.

"2. The court instructs the jury that agency need not be shown by direct and positive proof, but may be established by circumstantial evidence, and if the jury believe and find from all the facts and circumstances shown by the evidence in this cause that Frank H. Dunlop was the agent of defendant, Van Frank, and had authority as such to purchase from plaintiffs the goods mentioned in the petition in the name and on the credit of the defendant, then plaintiff is entitled to recover, and their verdict should be for the plaintiffs.

"3. If the jury find the issues for the plaintiffs they are entitled to recover the reasonable market value of the goods sold as shown by the evidence, not exceeding the amount stated in the petition, together with six per cent interest thereon from January 20, 1900, when this suit was filed, up to the present time."

At the instance of the defendant the court gave three instructions. Instructions numbered 1 and 2 are as follows:

"1. The burden of proof is upon the plaintiff to prove its case by a preponderance of the evidence. By the terms 'burden of proof' and 'preponderance of the evidence,' the court does not refer to the number of witnesses sworn on either side of the case, but means that you should find that in point of value and credibility that the evidence on the part of plaintiff outweighs that on the part of defendant.

"2. The court instructs the jury that no statement, declaration or admission of Frank H. Dunlop, that he was the agent of Van Frank in buying the articles mentioned in plaintiff's petition, and as such agent for Van Frank he bought the goods mentioned, such declaration, statements and admissions of said Dunlop is not competent testimony to prove or establish agency, and you are by the court directed to disregard the statements, declarations and admissions of said Frank H. Dunlop that he was acting as agent for Van Frank in buying said whiskey and other articles sued for."

Instruction No. 3 was the usual instruction as to the credibility of witnesses.

The defendant asked seven instructions, which were refused. In the view we take of the case it is only necessary to set out the tenth, which is as follows:

"10. The court declares the law to be, that before the plaintiff can recover in this action it must prove by a preponderance of testimony that defendant, Philip R. Van Frank, either directly authorized Dunlop to

purchase the goods in controversy or that Van Frank did such act as would lead a reasonable person to believe that he had constituted Dunlop his agent to buy goods of the kind sold by Sugg for his principal to Dunlop. Or you must believe that Van Frank knew that Dunlop was buying goods from plaintiff pretending to be the agent of defendant and that after being so informed he did not deny the truth of Dunlop's statements."

On consideration of the case, we are compelled to hold that the action of the learned trial judge in sustaining the motion for a new trial for the reasons assigned by him was erroneous. Taking up the first question asked the witness Lind, which was if he knew anything of Frank Dunlop withholding from Col. Van Frank letters or other mail matter that would come through the postoffice, addressed to Col. Van Frank, the witness answered, "Yes, sir." He was then asked how often that occurred, and he answered that it would occur as often as Dunlop would see a letter that he (Dunlop) wouldn't want Col. Van Frank to see. He was then asked if he knew what Dunlop would do with these letters, and he answered, "No, sir;" that Dunlop would put them in his coat pocket when he handed them to him, and that he had instructions from Dunlop to bring mail for everybody at the hotel; to bring mail to him first, positively. The point of these questions was that there was testimony in the case tending to show that plaintiff had written several letters to the defendant, advising him of the purchase of the barrels of whiskey by Dunlop and of the fact of their shipment, and sent bills for them, and it is claimed that this testimony of this witness which was excluded had a tendency to rebut the presumption that parties received letters mailed to them in due course. We do not think that this testimony excluded had any such tendency, nor that any such conclusion could be lawfully or appropriately drawn from it by the jury. It does not bring

the suppression of letters, if such was a fact, down to the suppression of the particular letters in controversy; even if it did, the man who suppressed the correspondence, if it was a fact that it was suppressed, was Dunlop, who in no event was the agent or representative of the plaintiff and in no event can the plaintiff be charged with the acts of Dunlop, who was the son-in-law and agent of Van Frank, in withholding from Van Frank the correspondence referred to. Taking a broader view of the matter, however, the first question asked might have been allowed to have been asked, that is, whether witness knew anything of Dunlop withholding from Col. Van Frank letters or other mail matter that would come through the postoffice, and his answer in the affirmative to this might have been permitted to stand. But followed up as it was, by the two following questions, it had no tendency whatever to prove the point aimed at, namely, the nonreceipt of these particular letters by Col. Van Frank. The question following it is so obviously improper under the answer given to it, as to demonstrate that not only it should have been excluded, but if that was intended as a sequence of the preceding question, both should have been excluded, for the answer is, "as often as he would see a letter that he would think he didn't want the Colonel to see." How is it possible for this witness, or any witness, to have known that? How could this witness, or any witness, possibly have known what letters Dunlop would think that he wouldn't want Col. Van Frank to see? Then comes the third question: "Do you know what Dunlop would do with these letters?" And the answer, "No, sir; he would put them in his coat pocket when I would hand them to him. I had instructions from Dunlop to bring mail for everybody at the hotel; to bring mail to him first, positively." There was no offer whatever to follow this up by showing that the letters referred to were addressed to Col. Van Frank or that Dunlop had suppressed any letters directed to

Col. Van Frank or that failed to deliver them. Dunlop was the manager of the hotel where Col. Van Frank boarded and of which hotel Col. Van Frank was the owner, and Lind was the porter or messenger about the hotel, who brought mail from the postoffice, and there was no impropriety whatever in the manager directing the porter to deliver all mail for the hotel to him, it appearing that at that time Cape Girardeau, where this occurred, had not the free delivery system and that patrons of the postoffice were obliged to send to the postoffice for their mail. We can not see that this had any tendency to rebut the presumption that letters mailed, properly addressed, had not been delivered in due course of mail; certainly it is a presumption that under the facts in the case should not be suffered to prevail against the plaintiffs. Furthermore, the excluded evidence was in itself incompetent because so general in its character as not to prove, but only allow a conjecture, that Dunlop suppressed plaintiff's letters and telegrams to defendant. The witness was not asked if any particular letters were suppressed, and only said Dunlop suppressed Van Frank's mail, "whenever the letters were such as Dunlop did not want Col. Van Frank to see." This is too indefinite and uncertain to be evidence tending to prove that letters written by plaintiff to Col. Van Frank about the whiskey in question were suppressed.

The second ground, based on the exclusion of the testimony of the witness Cochran, who was a telegraph messenger boy, as to whether he ever had any arrangement with Mr. Dunlop by which messages going into the hotel were to be delivered to him, may be tenable; the question might properly have been permitted to be asked, but the refusal to allow it to be asked, under the facts in this case, would not have constituted reversible error—at most it was harmless and is not sufficient ground to justify setting aside the verdict and granting a new trial.

This brings us to the errors complained of by the defendant as reasons why the motion for a new trial should have been sustained. They are errors founded upon the refusal of the court to give the seven instructions asked by it and heretofore set out. Instruction number 5 was properly refused. It is not the law of this State that a corporation of another state, selling to a customer in this State, through a traveling agent, is required to take out a license to do business in this State. The law concerning this was properly set out by the court in the first instruction which it gave at the instance of the plaintiff. The sixth instruction was a comment on particular parts of the evidence to the exclusion of all the evidence, and it would have been error to have given it; it singled out particular, specific evidence and commented on that to the exclusion of the other evidence in the case and was wrong in itself. The seventh instruction, to the effect that there was no evidence in the case that the defendant Van Frank gave direct authority, employed, appointed or constituted Dunlop his agent to buy the whiskey, was misleading in that form and would have tended to confuse the jury and unwarrantably have turned their attention to the fact that direct evidence should have been given of authority to constitute agency, which is not the law. The eighth instruction, to the effect, that if the jury believed from the evidence that Dunlop, by false and fraudulent representations to the agent of plaintiff, made with the intention to buy the goods sued for, converted the goods to his own use, and that the sale was made by plaintiff or its agent by reason of the full reliance on a statement made by Dunlop, that he was the agent of Van Frank and that such statements were false, that then the jury should find for defendant, was an incorrect statement of the law applicable to this case and not within the issues of the case. No such defense is pleaded. Furthermore, in the second instruction, which the court gave at the

instance of plaintiff, it fully and correctly covered the doctrine of proof of agency as applicable to this case and correctly covered the propositions which the defendant, by his seventh and eighth instructions incorrectly attempted to have in the case. The ninth instruction, to the effect that no consideration should be given by the jury to the fact that city and federal licenses were standing in Van Frank's name, is not a correct statement of the proposition. It is very true that these licenses standing in the name of Van Frank were not conclusive evidence of the fact of agency, but in connection with the other evidence in the case, they were entitled to be considered by the jury as a circumstance in establishing the fact of agency.

It may be said generally as to these instructions that they are subject to and fall within the condemnation of the opinion of this court as rendered by Judge GOODE in the Hackett case as reported in 105 Mo. App., in that they tend to announce abstract principles of law rather than the application to the facts in the case, in part, and again, single out particular facts, to the exclusion of all the facts. As to the tenth instruction, which we have set out and which was refused, it will be seen that it practically embodies the issues which this court said in the 105th Mo. App. case should be submitted to the jury, but counsel have evidently misunderstood or misapplied what was there said. To repeat, what Judge GOODE said in that case was that the case should be submitted to the jury to decide three several issues: First, whether Dunlop had authority to make the purchases in Van Frank's name; second, whether, if he did not have that authority at the time the purchases were made, had the defendant, with knowledge that they had been made, acquiesced in the action of Dunlop; third, if Dunlop's acts were found to have been neither authorized nor ratified by the defendant, whether defendant's behavior when he received the telegram induced Sugg to believe that Dunlop had

acted with authority and that so believing he made the sale on December 6th. All of these, when considered in the light of the case then before the court are to be understood on the supposition that the case was to be again presented to the jury by the plaintiff on the three theories or issues so pointed out. But in the present trial the plaintiff saw fit to rest its case on the first proposition alone, namely, whether Dunlop had authority to make the purchase in Van Frank's name. Plaintiff covered this proposition by its second instruction, and by that second instruction practically abandoned the question of subsequent ratification, which fact of ratification is set out in the second and third propositions made by Judge GOODE. Plaintiff had a perfect right to do this; that is to say, rest his case alone on the proof of agency in Dunlop. Having done that, to inject into the instruction asked, as was attempted to be done by this tenth, the element of acquiescence or ratification was improper. In other words, the second instruction which the plaintiff asked and which was given, covered the case on the theory on which plaintiff was willing to stand. Plaintiff had the right to abandon all other theories. If it was willing to abandon the question of ratification or estoppel, it had a perfect right to do so. It did it by the second instruction which it asked and which was given. In this view of the case, there was no error in refusing the tenth instruction, which the defendant asked. This conclusion leads to the result that the learned trial court erred on the grounds assigned by it in setting aside the verdict, and an examination of the record in the case satisfies us that the assignment of errors outside of that are not maintainable. We conclude that the trial court erred in sustaining the motion for new trial. Its judgment in that respect is reversed, and the cause remanded with directions to enter up judgment on the verdict as returned in the case. All concur.

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1910.

HOME TELEPHONE COMPANY, Appellant, v.
GRANBY & NEOSHO TELEPHONE COM-
PANY, Respondent.

St. Louis Court of Appeals, March 8, 1910.

1. **TELEPHONE COMPANIES: Duty to Furnish Service: Common Law Obligation.** Even though telephone companies are not common carriers in the sense that they are insurers, they are under obligation to furnish impartial service to any one offering to comply with their reasonable requirements.
2. ———: ———: **Statute.** Section 1255, Revised Statutes 1899, imposes the obligation on telephone companies operating in this State to act impartially and in good faith with respect to others.
3. **COMMON CARRIERS: Duty to Transport: Telegraph Companies.** In the absence of a statute or contract so providing, a common carrier cannot be compelled to do more than receive and transport or transmit to the end of its own line and deliver to a connecting carrier with reasonable promptness; and this much and no more has been enforced as the entire obligation of telegraph companies.
4. ———: **Involuntary Use of Instrumentalities by Rival Concern.** Common carriers cannot be required, on the assertion of a primary duty in the first instance, to turn over the physical use of their instrumentalities to a rival concern.

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5. **RAILROADS: Granting Exclusive Privilege.** At common law, a railroad may not grant an exclusive privilege to a connecting common carrier that operates as an unjust discrimination against others in the same class in respect of equal facilities for interchanging business.
6. **TELEPHONE COMPANIES: Duty to Receive Business from Other Companies: Statute.** Section 1255, Revised Statutes 1899, imposes the duty upon all telephone companies within its terms to receive business from other telephone companies.
7. ———: **Corporations: Public Service: Interest of Public.** A corporation by entering into the business of furnishing the public with telephone service invests the public with an interest, to which its private property rights are subject, both on account of the public use and the enjoyment of the special prerogatives of corporate existence.
8. ———: **Operation by Individual: Rights of Public.** Although the person conducting a general telephone business is a natural person, the use to which he has seen fit to devote his private property impresses the same with a public interest sufficient to sustain the right of others engaged in that business to enforce a physical connection with his exchange, if he has given that privilege to others, to the end that no unjust discrimination should be had in serving all of the same class.
9. ———: **Connecting with Other Companies: Granting Exclusive Privilege: Contract Void.** A contract between two telephone companies, by which each granted the other the privilege to connect with their respective exchanges, and each agreed to transmit all messages destined to points on the lines of the other, which were not reached by its own wires, over the lines of the other, and further agreed not to enter into any contract with any other person or corporation whereby any of the rights or advantages therein acquired by either party might be impaired raises an obligation on the part of said companies to grant the same right of connection and privilege of transmitting messages to other telephone companies, and the provisions therein contained which undertook to grant exclusive advantages and privileges are, therefore, void.

CONTRACTS: Void: Enjoining Breach. An injunction will not lie to restrain the breaching of a void contract.
11. **TELEPHONE COMPANIES: Right of Patron to Select Connecting Line: Common Law: Statute.** Both at common law and under section 1256, Revised Statutes 1899, a person sending a telephone message has the right to direct by what connecting lines it shall be transmitted, and it is the duty of the

initial company to forward the message over the lines thus selected, provided the facilities for transmitting the message over them are within the limits of the usual delivery of the initial company.

12. ———: ———: ———: ———: **Granting Exclusive Connecting Privilege: Contract Void.** A contract between two telephone companies, in which it is stipulated that all messages arising on the lines of either of the companies, destined to points on lines of the other not reached by its own lines, shall be transmitted over the lines of the other, is void as violating both the statutory and common law right of the sender of a message to select the connecting carrier to transmit the message beyond the lines of the initial carrier.
13. ———: **Contract Granting Exclusive Connecting Privilege: Not Authorized by Statute.** Sections 1254 and 1255, Revised Statutes 1899 are *in pari materia*, and must be read and interpreted together. Thus construed, section 1254, which authorizes telephone companies to join in using their lines, does not authorize the making of a contract between two telephone companies, granting mutual exclusive connecting privileges.
14. **UNLAWFUL COMBINATIONS: Section 8978: Liberally Construed.** Section 8978, Revised Statutes 1899, is in aid of the common law and should not, therefore, be strictly construed.
15. **TELEPHONE COMPANIES: Unlawful Combinations: Statute: Telephone Service is "Commodity."** Where two telephone companies enter into a contract to transmit over their respective lines messages originating on the lines of the other, the telephone service thus provided for is a "convenience or commodity," within the meaning of section 8978, Revised Statutes 1899.
16. ———: ———: **Contract Granting Exclusive Connecting Privilege: Statute.** A contract between two telephone companies, which gave each the exclusive right to have transmitted over its lines all messages coming from the lines of the other destined to points on the lines of the connecting company not reached by the lines of the other company, and which provided that the connecting carrier should receive for its service a percentage of the charge made, to be determined on the basis of the relative number of miles the message was transmitted on their respective lines, is void, under section 8978, Revised Statutes 1899, as prohibiting the parties thereto from buying such service as to messages, destined to points on the lines of the other, from other companies, and attempting to create a monopoly as to such business.

Dissenting Opinion by Reynolds, P. J.

17. ———: ———: ———: ———. Such a contract does not hinder any other company from carrying on and competing for business and does not create a monopoly.
18. ———: ———: **Statute Directed Against What Agreements.** It is against such agreements as prevent others from using the facilities of the contracting parties to as full an extent as other customers might use them that the anti-trust statute is aimed, which the contract in question does not do.
19. ———: **Duty to Receive Business from Other Companies.** A telephone company is bound to allow another telephone company to have access to its lines and connection with its subscribers, just as it is bound to allow like privileges to any other citizen.
20. ———: **Connecting with Other Companies: Granting Exclusive Privilege: Contract not Void.** A contract between two telephone companies, by which each granted the other the privilege to connect with their respective exchanges and each agreed to transmit all messages destined to points on the lines of the other, which were not reached by its own wires, over the lines of the other, and further agreed not to enter into any contract with any other person or corporation whereby any of the rights or advantages therein acquired by either party might be impaired, does not raise an obligation on the part of said companies to grant the same rights and privileges to other telephone companies—in other words, the right to become part of the system of said contracting companies. Said contract is valid and violates no law, common or statutory, and the installation by one of the contracting companies of an exchange for another telephone company in connection with its own exchange and taking said company in on its business as a joint operator of its system would be violative of the rights of the other contracting company under said contract.
21. ———: ———: ———: ———: **Constitutional Rights.** A construction of the statutes relative to telephone companies, which would compel one company to subject all its facilities to the use of a third party merely because it had made a contract letting another enjoy them, would violate the constitutional guarantee of protection in the use and enjoyment of one's own property.
22. ———: **Are Common Carriers to What Extent: Public Service Corporations: Right to Contract.** Telephone and telegraph companies are carriers *sub modo* only, and while they may aptly be called "public service corporations," this does not destroy their right of property or contract.

Appeal from Newton Circuit Court.—*Hon. F. O. Johnston*, Judge.

AFFIRMED.

McReynolds & Halliburton for appellant.

(1) The contract between plaintiff and defendant is specially authorized by the Statutes of Missouri. R. S. 1899, sec. 1254. (2) The contract between plaintiff and defendant is not invalid as being in restraint of trade, monopolistic or in violation of chapter 143, Revised Statutes of Missouri, 1899. The restraint (if any) is partial and the restriction reasonable, and such as affords a fair protection to the parties and is not so large as to interfere with the general public. *Skrainks v. Scharringhauser*, 8 Mo. App. 522; *Long v. Toll*, 42 Mo. 545; *Wiggins Ferry Co. v. Railroad Co.*, 73 Mo. 389; *Wiggins Ferry Co. v. Railroad*, 116 U. S. 615; *Finck v. Granite Co.*, 187 Mo. 269. (3) A contract limited as to time and space is valid, and a contract unlimited as to time but limited as to space is valid, and not so in restraint of trade as to mark it void. 9 Cyc., p. 525, par. C and pp. 527, 529, 530, 531; *Telegraph Co. v. Tel. Co.*, 5 Ohio Dec. (Reprint) 407; affirmed 7 Birs. (U. S.) 367; 29 Fed. Cas. No. 17445; *Richmond v. Railroad*, 33 Iowa 422; *Conn. v. Delaware, etc., Canal Co.*, 43 Pa. St. 295; *Brown v. Railroad*, 75 Hun (N. Y.) 355; 27 N. Y. Supp. 69, 56 N. Y. St. 748. (4) The finding of the court that defendant had not violated the contract is in the teeth of the evidence. A cursory glance at the evidence will satisfy this court that defendant had violated the contract. (5) An examination of the evidence will show the court that instead of the contract being in restraint of trade, so far as defendant is concerned, that it doubled defendant's capacity, give it double the number of phone subscribers in the territory reached by the wires of plaintiff and Bell companies, and give defendant additional territory

not reached by the Bell company. (6) The court has the right and power to specifically enforce the contract between plaintiff and defendant. *Railroad v. Railroad*, 144 N. Y. 152, 26 L. R. A. 610; *Telegraph Co. v. Harrison*, 145 U. S. 549, 36 L. Ed. 776; *Telegraph Co. v. Pennsylvania Co.*, 129 Fed. 849, 68 L. R. A. 968; *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 68 Am. St. 749; *Joy v. Railroad*, 138 U. S. 1, 34 L. Ed. 843. (7) A court of equity will grant injunction to protect contract right, and it is not necessary that injury should be irreparable and defendant insolvent. *Brewing Co. v. Waterworks Co.*, 34 Mo. App. 49; *Gordon v. Mayfield*, 84 Mo. App. 367; *Musser v. Brink*, 80 Mo. 350; *Jones v. Williams*, 139 Mo. 1; *Tool Co. v. Spring Co.*, 93 Mo. App. 530.

O. L. Cravens for respondent.

(1) This contract is void at common law governing monopolies in restraint of trade. *Slaughter v. Thacker C. C. Co.*, 55 W. Va. 642; 2 Am. and Eng. Ann. Cas., 335, and note, 336; *Fox Co. v. Scoen*, 77 Fed. 29; *Harrow Co. v. Quick*, 67 Fed. 130. (2) A contract between two public service corporations, supplying the same community with a public commodity and service, cannot legally contract to give each the exclusive right to sell such commodity and service in a specified portion of the territory, and binding one of the corporations to use no other of such commodity and service for its patrons than that produced by the other corporation, and to refrain from producing that commodity in the producing territory of such other corporation, was held totally void and unenforcible, as it tends to create a monopoly and is therefore contrary to public policy. *Nat. Gas Co. v. Nat. Gas & Fuel Co.*, 58 W. Va. 22, 6 Am. and Eng. Cas., 154, and note 157; *Gas. Co. v. Gas. Co.*, 121 Ill. 530; *State ex rel. v. Portland Gas Co.*, 153 Ind. 483; *Railroad v. Closser*, 126

Ind. 348. (3) Similar in principle to the case we have here is that line of decisions holding void as against public policy contracts of railroads and telegraph companies, giving the latter the exclusive right to use and occupy the right of way of the former for telegraph purposes. *Western Union v. Am. Union*, 65 Ga. 160; *Tel. Co. v. Western Union*, 23 Fed. 319; *Western Union v. Railroad*, 11 Fed. 7; *Pullman Co. v. Railroad*, 11 Fed. 625. (4) There being a penalty provided by sections 1255 and 1256 for violation of their requirements, and this contract being contrary thereto in its letter and spirit, renders it void as though expressly prohibited and thereby declared void. 15 Am. and Eng. Ency. Law (2 Ed.), 939; *Tri-State A. Co. v. Amusement Co.*, 192 Mo. 423; *Friend v. Porter*, 50 Mo. App. 89. (5) This contract is also illegal because it violates the anti-trust laws, chapter 143, R. S. Section 8966 prohibits the making of a contract made with a view to lessen or which tends to lessen, full and free competition in the sale of any article or commodity in this State, and declares such contracts void. A commodity has been defined as meaning "privilege, profit, gains." *Bank v. Apthorp*, 12 Mass. 252; *Minot v. Winthrop*, 162 Mass. 113; *Anderson's Law Dic.*, 211; 8 Cyc. 338; 6 Am. and Eng. Ency. Law (2 Ed.), 230.

NORTONI, J.—This is a suit in equity. Plaintiff seeks to enjoin further breaches of a contract between it and the defendant. Upon a hearing, the court dismissed the bill and plaintiff prosecutes the appeal. There is no question presented as to the form of the remedy pursued and that matter will remain unnoticed. Both plaintiff and defendant are telephone companies incorporated and existing under the laws of this State. The plaintiff, Home Telephone Company, maintains offices and telephone exchanges at Joplin, Carthage, Cartersville and other points in southwest Missouri and southeast Kansas. The defendant, Granby & Neosho

Telephone Company, owns and operates a telephone line from Granby to Neosho and maintains its offices and an exchange in each of those cities. Both companies, desiring to extend their business, entered into an arrangement in writing whereby they agreed to transmit messages over their lines destined to points in the territory occupied by the other company. Among other things therein stipulated, this contract required the plaintiff company to construct a connecting line from the city of Carthage to the city of Granby, a distance of about twenty miles, and connect the same with the defendant's exchange at the latter point. Partly in consideration of this contemplated connection by the extension of plaintiff's lines from Carthage to Granby, it was further provided in section four of the contract that each of the telephone companies agreed to transmit all messages destined to points in the territory of the other company, not reached by its own system of wires, to and over the lines of the other party. It was also stipulated that neither party would enter into any contract with any other person, firm or corporation whereby any of the rights, privileges or advantages therein assured should be impaired. By its terms the contract was to continue for a period of twenty-five years. It assured to each company an exclusive privilege of physical connection with the exchange of the other and assured as well an exclusive privilege to each company to transmit over its lines all messages originating or passing over the lines of the other destined to points not reached by the initial carrier and which were reached by the lines of the connecting company. The companies assumed mutual obligations with respect to transmitting the messages of the other and each agreed to at all times keep the lines and connections in proper repair for the use of the other. A further provision is made in subsequent portions of the instrument with respect to the division of the compensation received for transmitting the messages over the respective lines

therein contemplated. The two sections of the contract which are relevant to this controversy are as follows:

“Second: Each party hereto grants a license to the other party to connect with the telephone exchange or system of the other party, through its switchboard at Carthage and Joplin and Granby, so that an interchange of business may at all times be carried on between said parties. Said connections to be made as soon as the lines are completed, it being understood and agreed that the line of both parties hereto shall be so operated that service may be given from all lines owned, controlled or connected with the line or lines of either of the parties hereto over the lines of the other and its connections. And each party hereto agrees not to enter into any contract with any other person, firm or corporation whereby any of the rights, privileges or advantages herein acquired by either party may be impaired.

“Fourth: Each party agrees to transmit all messages destined to points on the lines of the other party hereto not reached by its own system of wires, to and over the lines owned and controlled by the other party. In consideration of the benefits to be derived by each of the parties hereto from the toll service herein provided to be furnished by each, each party agrees to transmit all business to points reached by its own line or lines, and those to be constructed or acquired over the lines of the parties hereto.”

It appears the plaintiff constructed the telephone line from Carthage to Granby, as required, and that the two systems were connected thereby. A physical connection of the lines was established under the contract by means of a switchboard in the defendant's exchange at Granby with the new line constructed thereto from Carthage by the plaintiff. For a considerable period the parties operated under this contract without any disagreement whatever, and it appears that at all times plaintiff faithfully transmitted all messages received

by its lines and destined to points on the lines of the defendant company, which were not reached by the lines of plaintiff, to and over the lines of defendant company. For a time, the defendant did likewise; that is to say, it transmitted all messages originating on its lines destined to points on the lines of the plaintiff company, which were not reached by the wires of defendant, to and over the lines of the plaintiff company to the point of destination. It appears, however, that after this arrangement had been in force and carried out for some time, the Missouri & Kansas Telephone Company, commonly known as the Bell System, interposed and refused to have certain business relations with the defendant, Granby & Neosho Telephone Company, unless that company would accord it equal privileges with the plaintiff, Home Telephone Company. In view of this, the defendant company acceded to the demands of the Missouri & Kansas Company to the extent of transmitting such messages as were received by it destined to points on the lines of both plaintiff company and the Missouri & Kansas Company, which were not reached by the wires of the defendant and at which points the Missouri & Kansas Company maintained individual telephones in offices or residences for patrons. The defendant company also permitted the Missouri & Kansas Telephone Company to enter its exchange at Granby and accorded it a physical connection with its lines by means of a switchboard, for the purpose of affording it equal facilities with the plaintiff, Home Telephone Company. Of course, this operated to violate the stipulations contained in the contract between the plaintiff and defendant to the effect that all messages received by defendant, destined to points on the lines of the plaintiff, not reached by the wires of defendant, should be transmitted by it over plaintiff's lines, and it operated also to violate the provision of the contract with respect to assuring the plaintiff an exclusive

right to a physical connection with the defendant's exchange at Granby. After having failed to induce the defendant to abide the stipulations vouchsafing the exclusive privileges mentioned, the plaintiff company instituted this proceeding to the end of enjoining further breaches of the contract. As before stated, the circuit court dismissed the bill on the grounds that in its opinion the contract was void as against public policy and therefore unenforceable.

Plaintiff prosecutes an appeal from that judgment and argues that the contract is a valid arrangement between the parties for the reason that it amounts to no more than an arrangement between connecting carriers whereby each selects the agency to forward initial business originating on its lines and thus enlarges the scope of a beneficial use. And it is said, as each telephone company enjoys the right which inheres in the ownership of property to control its own instrumentalities, no right of a physical connection with the exchange of either obtains in favor of any other person or company against the consent of the owner. The argument is that as the Missouri & Kansas Telephone Company could not enforce a physical connection with the exchanges of either the plaintiff or defendant contrary to the consent of the owner, then the stipulation in the contract affording an exclusive privilege to such physical connection as between plaintiff and defendant violates no rights of a third party. It is argued, too, that neither of the contracting telephone companies is under any obligation whatever with respect to the transmission of telephone messages after such messages leave their own lines. In other words, it is insisted that the obligation of the carrier goes only to the extent of carrying the message over its own lines and to deliver to the connecting carrier with reasonable promptness, and that, in view of this, each initial carrier may, in the absence of directions to the contrary, select the particular agency to be employed as a connecting carrier for

one or all of the messages it becomes the duty of the initial carrier to forward. Abstractly speaking, the propositions of law put forward in the arguments suggested may be sound but they must be treated with and applied in conjunction with other relevant principles which are invoked as well by the particular facts of the case.

Even though telephone companies are not common carriers in the sense essential to render them amenable under the obligations of an insurer (27 Am. and Eng. Ency. Law [2 Ed.], 1021; Jones on Telephones, sec. 243; State ex rel. v. St. Louis, 145 Mo. 551, 46 S. W. 981), there nevertheless arises from the voluntary undertaking to serve the public in their chosen capacity at least one obligation incident to the relation of a common carrier. This obligation the common law annexes to the use of their instrumentalities, which operates to affix the duty upon such companies of furnishing impartial services to any one offering to comply with their reasonable requirements, not only in respect to their public station system but also as to the private use of instruments installed in offices, residences and places of business. The obligation arising from the use is to furnish each and all equal facilities for communication without unjust discrimination, unless the privilege is sought for an illegal or immoral purpose. Authorities affirming the doctrine are numerous. [State ex rel. v. Kinloch Telephone Co., 93 Mo. App. 349, 67 S. W. 684; State ex rel. v. Cadwallader (Ind. Sup.) 87 N. E. 644; State ex rel. Webster v. Nebraska Telephone Company, 17 Neb. 126; State ex rel. Gwynn v. Citizens' Telephone Co., 61 s. c. 83; State ex rel. B. & O. Telegraph Co. v. Bell Telephone Co., 23 Fed. 539; s. c., 8 Am. & Eng. Corporation Cases, 7; State ex rel. Postal Telegraph Company v. Delaware & A. Telegraph & Telephone Co., 47 Fed. 633; Delaware & A. Telegraph & Telephone Co. v. State ex rel. Postal Telegraph Co., 50 Fed. 677; State ex rel. American Union Telegraph Co., etc. v. Bell Tele-

phone Co., etc., 36 O. 296; *People ex rel. v. Hudson River Tel. Co.*, 19 Abb. (N. Y.) 466; Chesapeake, etc., *Telephone Co. v. B. & O. Telephone Co.*, 66 Md. 399; *Bell Telephone Co. v. Commonwealth ex rel. B. & O. Telephone Co.*, 3 Central Rep. 907; *Hockett v. State*, 105 Ind. 250; *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1; *Central Union Telephone Co. v. State ex rel. Falley*, 118 Ind. 194; *Central Union Telephone Co. v. State ex rel. Hopper*, 123 Ind. 113; *Bell Telephone Co. v. Commonwealth*, 3 Atl. 829; *Telegraph Company v. Telephone Co.*, 17 Atl. 1071; *State ex rel. American Union Telegraph Co. v. Telephone Co.*, 22 Albany Law Journal, 363; *United States Telephone Co. v. Central Union Telephone Co.*, 171 Fed. 130; *State ex rel. v. Bell Telephone Co.*, 11 Central Law Journal, 359; s. c. 22 Albany Law Journal 363; 27 Am. & Eng. Ency. Law (2 Ed.), 1021; Jones on Telephones, sec. 243, *et seq.*

In keeping with this doctrine the courts have, under varying circumstances, denied the right of telephone companies to withhold from one person the privilege accorded to another and forced such companies to install telephones for the use of a proposed private patron upon his paying the price and complying with the reasonable rules of the company, to the end that no discrimination may be allowed. Such were the cases of *State ex rel. v. Kinloch Telephone Co.*, 93 Mo. App. 349, 67 S. W. 684; *State ex rel. v. Nebraska Telephone Co.*, 17 Neb. 126; *State ex rel. Gwynn v. Citizens' Telephone Co.*, 61 s. c. 83 and several other among those above cited. The principle has been applied and enforced, too, with respect to the rights of other telephone and telegraph companies, notwithstanding the fact that such companies were competitors or rivals in the same business. The doctrine of those cases is to the effect that even though a rival telegraph or telephone company might not in the first instance have the right to compel the use of another company's appliances and service, such right accrues upon the one company according the

same to another of the same class engaged in like business. In the case of *State of Missouri ex rel. B. & O. Telegraph Co. v. Bell Telephone Co.*, 23 Fed. 539, s. c., 8 Am. and Eng. Corporation Cases, 7, it appeared that the telephone company had established a business connection with the Western Union Telegraph Company by means of installing its telephone in the Western Union offices and denied the same right to the Baltimore & Ohio Telegraph Company. Justice BREWER conceded the right of the telephone company in the first instance to deny the use of its instrumentalities to its competitor or business rival but said that inasmuch as it had established such a connection and afforded the use of its appliances to the Western Union Telegraph Company, it thereby assumed the obligation to render like service, on equal terms, to all of the same class. The learned judge said:

"I agree that if this telephonic system had refused a telephonic connection with any telegraph company, that the Baltimore & Ohio Telegraph Company could not insist upon such connection, but when it has established telephonic connection with one telegraph company, I think every other telegraph company has equal right; on the same principle that if it established a telephonic connection with one lawyer, it could not refuse telephonic connection with another lawyer."

The same situation was presented in *State ex rel. Postal Telegraph Co. v. Delaware & A. Telephone Co.*, 47 Fed. 633. In that case the telephone company had established business relations with the Western Union Telegraph Company and afforded it facilities for telephonic communication by installing a telephone in the Western Union office. The telephone company denied the same right to the Postal Telegraph Company. The Circuit Court of the United States enforced the right of the Postal Telegraph Company by mandamus and said that as the telephone company had selected the telegraph as one of the classes it was willing to serve, all of

the same class should be afforded equal facilities and without discrimination. The judgment in this case was affirmed by the United States Circuit Court of Appeals, Third Circuit, as will appear by reference to *Delaware & A. Telephone Co. v. State ex rel. Postal Telegraph Co.*, 50 Fed. 677. To the same effect is *People ex rel. v. Hudson River Telephone Co.*, 19 Abb. (N. Y.) 466. In that case the telephone company had established a business relation with and installed telephones for the use of the Western Union Telegraph Company and denied the identical right to the Postal Telegraph Company. The court declared that as the right had been accorded to the Western Union Telegraph Company an obligation thereby arose out of the nature of the business to accord the same right to the Postal Telegraph Company and this, too, notwithstanding the fact that both the defendant telephone company and the Postal Telegraph Company were engaged as competitors in a messenger service. So much of the telephone company's rule forbidding the use of its telephone by the Postal Telegraph Company for the purpose of calling messengers and thus employing its appliance in competition with it in the messenger service was declared without force. To the effect that a telephone company may not afford the use of its connection and appliances to one telegraph company and unjustly discriminate by denying the same to another, see also *State ex rel. American Union Telegraph Co. v. Bell Telephone Co.*, 11 Central Law Journal, 359; s. c., 22 Albany Law Journal, 363. For an instructive case declaring the identical doctrine above referred to, see *Commercial Union Telegraph Co. v. New England Telephone Co. (Vt.)*, 5 L. R. A. 161 and notes.

The judgment given in each of the cases above referred to proceeds in affirmance of the obligation enjoined by the principles of the common law. Other courts have ruled to the same effect by commingling the common law principles with statutory obligations imposed. It is said that both under the common law and the statu-

tes one telephone company may not accord the right of a physical connection with its exchanges by another telephone company and deny the same to others of the same class. Such exclusive contracts are declared to be against public policy and void both at common law and under the statutes. [State ex rel. Goodwine v. Cadwallader (Ind. Sup.), 87 N. E. 644; United States Telephone Co. v. Central Union Telephone Co., 171 Fed. 130.]

Aside from the common law obligation above referred to, our statutes impose the obligation on telephone companies operating in this State to act impartially and in good faith with respect to others. The statute is as follows:

"It shall be the duty of every telegraph or telephone company, incorporated or unincorporated, operating any telephone or telegraph line in this State, to provide sufficient facilities at all its offices for the dispatch of the business of the public, to receive dispatches from and for other telephone or telegraph lines, and from or for any individual, and on payment or tender of their usual charges for transmitting dispatches, as established by the rules and regulations of such telephone or telegraph line, to transmit the same promptly and with impartiality and good faith, under a penalty of two hundred dollars for every neglect or refusal so to do, to be recovered, with costs of suit, by civil action, by the person or persons or company sending or desiring to send such dispatch, one-half of the amount recovered to be retained by the plaintiff, and one-half to be paid into the county public school fund of the county in which the suit was instituted; and the burden of proof shall be upon the company to show that the wire was engaged as the reason for the delay in transmitting such dispatch." [Sec. 1255, R. S. 1899, sec. 1255, Ann. St.] The courts have held generally that statutes such as ours above quoted are merely declaratory of the common law obligations. See *Davis v. Western Union Telegraph*

Co., 1 Cinc. Super. Ct. Reporter 100; s. c., Allen's Tel. Cas. 363; De Rutte v. N. Y. Alb. & Buff. Tel. Co., 1 Daly (N. Y.) 547; Western Union Tel. Co. v. Reynolds, 77 Va. 173; Western U. Tel. Co. v. Graham, 1 Colo. 230; Tyler v. Union Tel. Co., 60 Ill. 421; s. c. (on App.), 74 Ill. 168; G. C. & S. F. R. R. v. Levy, 59 Tex. 542; Telegraph Co. v. Griswold, 37 Ohio 301; Western Union Tel. Co. v. Neill, 57 Tex. 283; Wolf v. Western Union Tel. Co., 62 Pa. St. 83; Passmore v. Western Union Tel. Co., 78 Pa. St. 238; N. Y. & Wash. Pr. Tel. Co. v. Dryburg, 35 Pa. St. 298; Dorgan v. Telegraph Co. (C. C. S. D. Ala. 1874), 1 Am. L. T. Rep. (N. S.) 406; Turnpike Co. v. News Co., 43 N. J. Law, 381.

Under the statute of Ohio, in all respects material here identical with our own, the Supreme Court of that state declared that, independent of the common law, the statute quoted imposed the obligation upon a telephone company affording a business connection to one telegraph company to grant the same with impartiality to all others. In that case, the telephone company, as in many others above referred to, was the licensee of the American Bell Telephone Company which owned the telephone patent and was operating its telephone line under a contract with the owner of the patent to the effect that it should afford the Western Union Tel. Co. an exclusive right to transmit messages over its lines. This contract, in this respect, is similar to the one in judgment now before us. The Supreme Court declared the contract void as violative of the statute above referred to in that it purported to authorize the giving of one telegraph company an exclusive right to employ the telephone; that in so doing, it operated an unjust discrimination against other telegraph companies employed in the same service. The court said the telephone company "cannot be permitted to operate a line or system of telephones, in this State, and in the face of the statute, either directly or through the agency of licensees without impartiality, or in other words, with dis-

crimination against any member of the general public who is willing and ready to comply with the conditions imposed upon all other patrons or customers who are in like circumstances." See *State ex rel. v. Bell Tel. Co.*, 36 O. 296. The Supreme Court of Maryland declared the same with respect to a like contract whereby the owner of the patents inhibited the local telephone company from permitting the use of the telephones by any other telegraph company than the one therein mentioned. The court declared that the statute referred to imposed the obligation of impartial service to all persons alike and that the inhibition of the patentee contained in the license or contract with the local telephone company forbidding the employment of the telephones in the service of any company, other than the Western Union Telegraph Company, was void as against the public policy of the state declared by the statute, for the reason it operated an unjust discrimination against other telegraph companies. The doctrine is that if the telephone company sees fit to voluntarily afford facilities to one telegraph company, it must afford the same to all others of the same class who apply on like terms. And this is true notwithstanding the parties may be business rivals. See *Chesapeake & Potomac Telephone Co. v. Baltimore & Ohio Telegraph Co.*, 66 Md. 399.

But it is argued first that the law does not impose the obligation even upon a common carrier, such as railroads, to transport beyond the limits of their own lines, and, second, that such institutions as railroads, which are universally declared to be common carriers for all, may refuse to accord a rival the physical use of its instrumentalities. We believe it is true as a general proposition that in the absence of contract or statute to that effect, a common carrier may not be compelled to do more than receive and transport or transmit to the end of its own line and deliver to the connecting carrier with reasonable promptness, and this much and no more has been enforced as the entire obligation of telegraph

companies. [United States Telegraph Co. v. Western U. Co., 56 Barb. (N. Y.) 46; Baldwin v. United States Telegraph Co., 6 Abb. Pr., N. S. (N. Y.) 405.] It is the law, too, without doubt, that common carriers may not be required, on the assertion of a primary duty in the first instance, to turn over or surrender the physical use of their instrumentalities to a rival concern. The principle on which the courts have given judgments of immunity in such circumstances is that relating to the prerogatives which inhere in the ownership of property. On this principle it is declared that common carriers, like other persons, enjoy the right to an exclusive control and use of their instrumentalities as against a rival, notwithstanding the public concern in their business. Among others, the Express Cases, 117 U. S. 1, are authority for this proposition. See also Jencks v. Coleman, 2 Hun Rep. 221; Barney v. Oyster Bay, etc., Steamboat Co., 67 N. Y. 301; Shelbyville R. R. Co. v. Louisville, etc., R. R. Co., 82 Ky. 541; L. & N. R. R. v. Central Stockyards Co., 29 Sup. Ct. Rep. 246. The case of Lake Superior, etc., R. R. Co. v. A. T. & S. F. R. R. Co., 93 U. S. 442 is also instructive.

However, this doctrine touching the right of common carriers to an exclusive control of their instrumentalities, notwithstanding the public interest, arises largely from consideration of public policy influenced to a more or less extensive degree by the very necessities of the calling.

It is sufficient to suggest that no one can foresee or foretell the possibilities for interminable confusion, and extraordinary dangers which would attend the promiscuous use of the tracks, terminals and instrumentalities of one railroad by another without consent.

It is said that the identical doctrine obtains with respect to the right of one telephone company to enforce the physical use of the exchange of another to the end of connecting with its lines. This may be true but it is certain that although the obligations of the railroad

and the telephone company are similar, the duty of each when considered with reference to the means employed to discharge it, is not in all respects the same. In the first place, it is the duty of the railroad to transport for its patron, in its own way, on its own conveyances, and to deliver to the connecting carrier. In thus discharging its obligation, the railroad company retains possession, operates and manages the instrumentalities by which the transportation is had. It is not so with the telephone. The act of telephoning is the act of holding a conversation with another over the wires of the telephone company. The conversation, instead of being delivered to the agency of the telephone company, as are the goods to the agents of the railroad or the dispatch to the agent of the telegraph company for transmission, is transmitted by the patron of the telephone himself, by means of electrical undulations which reproduce at the farther end of the line the pulsations set in motion by the first speaker. The act of transmission is instantaneous and self-executing. Instead of placing the message in the possession of the carrier for transmission in his own way, while operating his own instrumentalities, the telephone instrument and line are placed in possession of the patron to be operated by him while the communication is being had. This distinction in the mode and manner of the use may afford a strong reason when the question is squarely presented for denying the relevancy of the principle affording a railroad company the primary right to deny another engaged in the same business the physical use of its appliances. It would seem in the case of the telephone, the use is of a character which impresses a public interest sufficient to repel the influence of the principle of immunity on the grounds of proprietary right as secondary to that which enjoins an efficient public service. On this question we give no opinion, for it is unnecessary to a proper disposition of the case. But when we remember that the rule referred to in respect to common carriers gen-

erally is predicated largely upon the necessities arising from the stupendous occupation and the impracticability incident to permitting one railroad to use the appliances of another, the thought is suggested that the logic of the doctrine might not enforce the same conclusion in respect to telephones, for it is certain that many telephone lines may be served at the same time through the same switchboard in the same exchange without entailing either confusion or danger. Be all of this as it may, the disposition of the present appeal does not require the court to give judgment to the effect that a physical connection could be enforced between telephone companies in the first instance as a primary right. It is sufficient to say that as the plaintiff and defendant in this case saw fit to waive their primary right in the first instance to deny a physical connection to any company engaged in the telephone business, the matter must be disposed of with reference to the secondary right of other companies of the same class to be accorded equal facilities, to the end that no unjust discrimination may be had. Even though the rule obtains that such common carriers as railroads have the primary right to control their own stations and terminals and other appliances and to deny the use thereof to a competitor, as has frequently been declared, *Ilwaco Ry Co. v. Oregon, etc., Co.*, 57 Fed. 673; *Elliott on Railroads*, sec. 1681 and authorities *supra*, it is well settled that a railroad company may not at common law grant an exclusive privilege to another and connecting common carrier that operates an unjust discrimination as to others of the same class in respect of equal facilities for an interchange of business. As, for instance, if a railroad grants to one connecting carrier certain privileges touching the facilities for an interchange of business, it thereby precludes itself from asserting its primary right to deny to others similarly circumstanced the same. In Florida, a railroad company leased its entire wharf or landing adjacent to the river to a particular navigation line and

accorded such navigation company an exclusive privilege to interchange business with it thereon. The court denied the validity of the exclusive privilege thus sought to be established and maintained the right of other connecting carriers to be afforded the same use of the railroad facilities for the same purpose. See *Indian River Steamboat Co. v. East Coast Transportation Co.*, (Fla. Sup.) 10 South. Rep. 480.

In this State a railroad company granted to a connecting hack line an exclusive privilege of receiving and discharging passengers at a particular portion of its depot platform. At the suit of a rival hack line, the court declared the exclusive contract void for the reason it operated an unjust discrimination in facilities in favor of one common carrier against another. It may be, and no doubt is, true that neither of the hack lines involved in that case could enforce the right of a physical use of any particular part of the depot platform of the railroad company, but it appearing that the privilege had been granted to one to use a certain portion thereof, the court declared another could use the same portion, as an obligation existed in favor of all to the end that there should be no unjust discrimination. [*Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106. See, also, *McConnell v. Pedigo*, 5 Am. & R. R. Corp. 711 Rep. and cases in note.]. These cases deal with the question of discrimination by one common carrier against another as to equal facilities for connecting business and that is this case, precisely, for the question relates not to an interchange of business. As to the reception and transmission of the business from other companies, the statute, *supra*, sec. 1255, pointedly lays this obligation on every company falling within its provisions.

The actual interchange of business between railroads and the transportation thereof by each connecting road for the other is a question which leads quite beyond the matter of equal facilities and essentially involves the right of contract between the parties as to the terms

on which each will do business with the other. Because of the right of contract and because it is not competent to make contracts for parties, the courts have hesitated to enforce, at the suit of one carrier, the identical privilege accorded to another on the grounds of discrimination for the interchange and transportation of connecting business. However, while it was held in the noted case of *A. T. S. F. R. R. Co. v. D. & N. O. R. R. Co.*, 110 U. S. 677 that one connecting railroad company could not compel another to erect a station and interchange business at a particular point selected by the complaining company on the theory that the defendant had discriminated through entering into a business arrangement for interchanging traffic with another at the union station, the court nevertheless inferentially declared the right to equal privileges, even for interchanging business, existed and might have been enforced had the complainant been similarly circumstanced and sought to enforce the identical privilege accorded to the favored company. In that case the court said:

"A railroad company is prohibited, both by the common law and by the Constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road. . . . The bill does not seek to reduce the local rates, but only to get this company put into the same position as the Denver & Rio Grande on a division of through rates. This cannot be done *until it is shown that the relative situations of the two companies with the Atchison, Topeka & Santa Fe, both as to the kind of services and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must necessarily be reasonable for the other.*"

That case clearly implies that the right of equal privileges as to interchanging business existed and would have been enforced had the complainant been circumstanced the same and sought an interchange of business at the union station such as was being afforded to

the favored company. It is true a different doctrine obtains under the Interstate Commerce Law as the direction of that act to afford equal facilities for interchanging business is said to be controlled and limited by another provision to the effect that it "shall not be construed as requiring a carrier to give the use of its tracks or terminals facilities to another carrier." [Little Rock, etc., R. R. Co. v. St. Louis & S. W. Ry. Co., 63 Fed. 775.] However, all of this is beside the question here, which is one of equal facilities and not as to interchanging business, and then, too, the duty to receive business from all companies is expressly imposed upon all telephone companies within its terms by section 1255, Revised Statutes, quoted. The principle portrayed in the cases above cited as to equal facilities, other than that under the Interstate Commerce Law, points the true course of decision on the facts before us, for it appears here that these telephone companies have granted to each other the right of a physical connection and deny it to other concerns of like kind similarly situated. This they may not do, for although a physical connection might not have been enforced in the first instance with the exchange of either company and would have been denied on the theory that it would involve an invasion of the primary right of the owner of the exchange to control its own property, the act of according a physical connection with each other operates to waive the primary right of either company and raises an enforceable obligation to accord the identical privilege to others.

As to the proposition that an enforcement of a physical connection of other telephone lines with the exchanges involved here is violative of the rights of property which inhere in the companies owning such exchanges, it is to be said that by entering into the avocation of furnishing the public with telephone service, the use operates to invest the public with an interest to which the private property rights referred to are

subject. Besides, each of these companies enjoy the special prerogatives of a corporate existence involved in their franchises granted by the state. Either the public use or the public grant referred to impresses the property with the public interest. The principle was announced in an early case as follows:

"Where private property is, by the consent of the owner invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as his private property only, but must hold it subject to the rights of the public, in the exercise of that public interest or privilege conferred for their benefit." *Allnutt v. Inglis*, 12 East. 527.

In *Munn v. Ill.*, 94 U. S. 113 (2d l. Ed. 77), private parties owned certain warehouses or elevators used in receiving, storing, assorting and reloading grain for transportation. The Legislature levied a tax on like property as though it concerned the public interest because of the use. In giving judgment on the validity of the tax, the Supreme Court of the United States said:

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control."

Aside from the question as to these companies enjoying their franchises as corporations granted by the state in which, of course, the public has an interest, it is clear from the authorities quoted that even if the two parties to this suit were private individuals, conducting a general telephone business, as they are, such use to which they have seen fit to devote their private property would impress the same with a public interest

sufficient to sustain the right of other telephone companies in successfully enforcing a physical connection with the exchanges mentioned to the end that no unjust discrimination should be had in serving all of the same class.

In keeping with this doctrine, the Supreme Court of Kentucky declared that where two telephone companies had entered into a contract for a physical connection by means of a switch in their exchanges and no time was limited when such contract should expire, the right to maintain such physical connection continued as long as either continued to exercise its franchise as a telephone company. The reasoning of the court on that question recognized the primary right of the contracting companies in the first instance to control their instrumentalities and said that it was a proper matter of contract primarily, but as they had contracted with reference to the same without limitation as to time when the right of connection should expire, the matter was, because of the use, one of public concern and therefore the relation thus established could not be severed by the withdrawal of one company so long as it remained in the telephone business. [Campbellsville Co. v. Lebanon Co., 118 Ky. 277, 80 S. W. 1114, 84 S. W. 518.]

In view of the doctrine hereinbefore adverted to, the Supreme Court of Indiana very recently in *State ex rel. Goodwine v. Cadwallader*, 87 N. E. 644, declared that although telephone companies might refuse in the first instance to accord a physical connection with other lines through their exchanges that if they saw fit to grant the right to one company, the public interest required the same privilege should be accorded to others. It is said that as the company saw fit to waive its primary right with respect to the absolute control of its own property and grant a physical connection to another telephone line such voluntary act raised an obligation to grant an equal privilege without discrimination to

others engaged in the same calling and that this obligation was one which the courts would enforce by mandamus. To the same effect is the well considered case of United States Telephone Co. v. Central Union Telephone Co., 171 Fed. 130.

We therefore conclude that as by the contract involved here the defendant granted the right of a physical connection with its exchange to the plaintiff this raised an obligation on the part of defendant to grant the same right to other telephone companies as well and that the provisions in the contract to the effect that like advantages and privileges should be granted to no other person or corporation are void and of no effect. The contract being void, of course, it may not be enforced in this proceeding.

Another feature of the case arises under the provisions of our statutes, section 1256, which is as follows:

“Where the person sending the dispatch desires to have it forwarded over the lines of other telephone or telegraph companies, whose termini are respectively within the limits of the usual delivery of such companies, to the place of final destination, and shall tender to the first company the amount of the usual charges for the dispatch to the place of final delivery, it shall be the duty of the company to receive the same, and, without delaying the dispatch, to pay to the succeeding line the necessary charges for the remaining distance; and it shall be the duty of the succeeding line or lines to accept the same, and forward the dispatch in the same manner as if the person sending the same had applied to the agent or operator of such line or lines in person, and paid to him the usual charges; and for omitting so to do the company or companies owning or operating such line or lines shall severally be liable to the penalty prescribed in section 1255.”

This section clearly recognizes the right of a person sending a telephone message over the lines of one company to direct by what connecting line it shall be

transmitted, provided the facilities for the reception of business of such connecting system are within the limits of the usual delivery of the initial company, and affixes an obligation upon the initial company to forward the message as directed by its patron. There can be no doubt of the right of the sender of the message, at common law, to select the route and the connecting agency by which it is to be transmitted. [Jones on Telephones, sec. 463.] Now, the contract before us pointedly stipulates that all messages arising on the lines of either of the parties, destined to points on lines of the other which are not reached by the lines of the initial carrier, shall be transmitted over the lines of the other. This provision is, no doubt, violative both of the common law right of the sender referred to and of the statute above quoted as well. To illustrate, a patron of the Granby & Neosho Telephone Company at Granby may desire to communicate with some one at Joplin who has a Bell telephone in his office and upon requesting from the Granby Company the privilege of communicating through its exchange over its lines and the Bell lines as well is entitled to be accorded the privilege. Notwithstanding this right of the sender, the contract pointedly stipulates that the Granby Company shall have no right to transmit messages to Joplin over any line other than those of the plaintiff. It appears both the plaintiff and the Bell system maintain lines between Granby and Joplin. For the Granby Company to grant to its patrons this right which the law secures to select the connecting carrier, essentially operates a breach of the contract between these parties which accords an exclusive privilege to the plaintiff company as to the transmission of such message. It appears, therefore, that the exclusive right as to transmission referred to is violative both of the statute and the common law on the question and is therefore void and of no effect.

Another section of our statute (sec. 1254) authorizes the joint use of telephone lines. This statute is as follows:

"Any company incorporated as herein provided may contract, own, use and maintain any line or lines of telephone or magnetic telegraph, whether wholly within or wholly or partly beyond the limits of this State, and shall have power to lease or attach to the line or lines of such company other telephone or telegraph lines, by lease or purchase, and may join with any other corporation or association in constructing, leasing, owning, using or maintaining their line or lines, upon such terms as may be agreed upon between the directors or managers of the respective corporations, and may own and hold any interest in such line or lines, or become lessees thereof, on such terms as the respective corporations may agree."

It is argued by the plaintiff that as this section authorizes telephone companies to join in using their lines, the contract before us is thus expressly authorized by the statute. We are not so persuaded. The several statutes quoted are *in pari materia* and must be read and interpreted together. There are many plans by which telephone companies may join in using their respective lines without affording to either an exclusive privilege or operating a discrimination against those rightfully entitled to the same privileges. The statute quoted obviously contemplates that such companies may join in using their lines or system in a manner not violative of the other statutes referred to. Section 1255 declares the common law obligation of telephone companies to deal impartially and with good faith towards all other telephone companies in the matter of the reception and transmission of messages. This means, as said by the Supreme Court of Ohio, in *State v. Bell Telephone Co.*, 36 O. 296, that they shall accord equal privileges to all of the same class and that there shall be no unjust discrimination. When section 1254, above

quoted, is interpreted in the light of the common law obligation thus declared in section 1255, it is certainly clear that the joint use of telephone lines authorized relates to a use not unlawful by operating an unjust discrimination.

We believe, too, the exclusive privilege accorded in and now sought to be enforced under the contract is violative of the public policy of the State as declared in section 8978, Revised Statutes 1899, section 8978, Ann. St. 1906, and therefore void. The contract stipulates that each of the two companies shall have the exclusive right to transmit over its lines all messages coming from the lines of the other which are destined to points on lines of the connecting company and not reached by the lines of the initial carrier. When this provision is analyzed, it is observed that it requires each of the parties to transmit all messages either passing over its lines or originating with it and destined to points on the lines of the other not reached by its own lines, over the lines of the other party, to the exclusion of all others.

Each company may discharge its full duty to the public by carrying the message of its patron to the end of its own line and delivering the same with reasonable promptness and due care to the connecting carrier. In performing this duty in respect to a message not routed by the sender by delivering to and forwarding a message over a connecting line, the initial carrier assumes the attitude of a purchaser of the convenience or commodity of telephone service from the connecting carrier to transmit the message to destination. And identically as the initial carrier of the message becomes a purchaser of the service of the connecting company to complete the transmission, so the connecting company becomes the seller of its service to the end of transmitting the message over its own lines.

Thus viewed, it is obvious that the two telephone companies are engaged to some extent in buying and

selling telephone service from and to each other. At any rate the contract contemplates a situation where such should be the case. The contract provides in other portions how the connecting carrier is to be paid for such services by accepting from the initial carrier such percentage of the compensation collected as accords with the relative number of miles the message is transmitted over its lines as compared with those of the other company. Now, so much of the statute as is relevant to this feature of the case is as follows:

"If any two or more . . . corporations who are engaged in buying or selling any . . . commodity, convenience . . . or any article or thing whatsoever, shall enter into any . . . agreement . . . or understanding . . . to limit competition in such trade, by refusing to buy from or sell to any other person or corporation any such article or thing aforesaid, for the reason that such other person or corporation is not a member of or party to such . . . combination, confederation, association or understanding . . . it shall be in violation of this article." [Sec. 8978, R. S. 1899, Ann. St. 1906, sec. 8978.]

This statute is said by our Supreme Court to be in aid of the common law, therefore not to be strictly construed. [State ex inf. Hadley v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.]

In this view, it is certainly proper to treat telephone service as a convenience or commodity being bought and sold between those companies. It is very true that under the contract either one of the parties thereto are free to sell their service to whomsoever they will. The right to sell the convenience or commodity of telephone service is not sought to be restrained by the contract. However this may be, it is otherwise as to the right of either company to buy the convenience or commodity of telephone service for the purpose of transmitting messages which originate on or pass from

the lines of one company and are destined to points on the lines of the other not reached by the initial carrier. In respect of such messages, neither company is permitted to buy the commodity or convenience of telephone service from any company other than the party to the contract. To illustrate, it appears that both the Home Telephone Company and the Missouri & Kansas Telephone Company or Bell line, which is not a party to the contract, at present connect through a switchboard with the Granby & Neosho Company at Granby. Now, suppose a patron of the Granby & Neosho Company, in his residence at Granby, desired to communicate by telephone with some person at Joplin, to which point both the Home Telephone Company and the Missouri & Kansas Telephone Company maintain lines. Upon signifying his intention to that effect, through the telephone to the operator in charge of the Granby Company's switchboard at the Granby exchange, it immediately becomes the duty of the Granby company, under this contract, to connect such patron with the city of Joplin office over the line of the Home Telephone Company to the exclusion of the Missouri & Kansas Telephone Co. Therefore, the contractual provision mentioned requires the Granby Company to buy the service between Granby and Joplin from the Home Telephone Company to the exclusion of all others. And this is true even though another company may afford better facilities and more prompt service.

It is entirely clear that such an arrangement as that portrayed above operates to limit competition in respect to such commodity or convenience as telephone service as is proffered or available for the transmission of messages in the territory occupied by these companies and attempts to confer a complete monopoly on each of the contracting parties with respect thereto.

As the contract assures to each company the exclusive right to transmit all messages, or, in other words, furnish the service for all messages originating

on or passing from the lines of the other destined to points on its own lines and not reached by lines of the initial carrier, this of course requires that the initial carrier shall not buy such service to the same end from any other company not a party to the contract. The arrangement therefore falls within the very words of the statute and is subject to its inhibition. The exclusive privilege referred to, if valid, will confer a complete monopoly on the two contracting companies with respect to the business mentioned and prohibit either from buying like service of all other companies for the reason they are not parties to the contract and the contract is therefore void.

The judgment should be affirmed. It is so ordered. *Goode, J.*, concurs. *Reynolds, P. J.*, dissents.

DISSENTING OPINION.

REYNOLDS, P. J.—I am compelled to dissent from the views expressed and the conclusion arrived at by my brother NORTON, in his very learned and exhaustive opinion. The contract between the plaintiff and defendant, as I read it, did not in any manner hinder any other company from carrying on and competing for business. Nor did it promote a monopoly. Neither did the contract prohibit other concerns from using the facilities of the Granby & Neosho Company to as full an extent as any other of its customers might use them. It is against such agreements that our statute is aimed. It is for the protection of the public against monopolies and extortion. Beyond doing that they do not attempt to go. It is not within their letter or spirit to require one who has by his means and labor and brain built up a business to let everyone or anyone else into its enjoyment. What he is to do is to so conduct his business that in his dealings with the public all are treated alike. Fairness and equality to all, favors or special privileges in the conduct of the busi-

ness as a public business to none, is the life of the law. This is very far from letting another in the same line of business into a participation in that business, even if the owner, by his voluntary act has chosen to let in some other. It is the public who is under the protection of the law and the courts. Neither are concerned in promoting the interests of one corporation as against another. The defendant was and is bound to allow the Missouri & Kansas Telephone Company, a corporation, but for many purposes in law, a person, a citizen, to have access to its lines and connection with its subscribers, just as it was bound to allow any lawyer, bank, merchant or other citizen. That is the case of *State ex rel. B. & O. Tel. Co. v. Bell Tel. Co.*, 23 Fed. Rep. 539, and of *State ex rel. v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684, and kindred cases cited by my learned brother. That is all the law, common or statutory, demands. But the defendant proposes to do and is doing more than this with the Missouri & Kansas Telephone Company. It installed an exchange for it in connection with its own exchange, took it in or let it into its business, not as a patron and customer, but as a joint operator, so to speak, of its own system, and this it had no right to do under its contract with plaintiff. The trouble with the opinion of my learned brother, in my judgment, is, that two ideas are confused: One the right of all the public to enjoy equal privileges with every one else of the public in the use of telephone service over defendant's line; the other, the right of the defendant, notwithstanding its contract with plaintiff, to allow another company, engaged in the same business, the same rights granted plaintiff; in short the right to become a part of its system. I do not think our statute requires this, any more than, by way of illustration, when it requires one railroad to connect with another for transfer of traffic from one to the other, it requires it to allow that other the use of its tracks or engines, or its station houses or freight ware-

houses, merely because it has allowed some one or other road these facilities for business. Thus one road may agree with another to share with it the use of its tracks or motive power. That would not compel it to allow another company like participation. I know it is said in the U. S. Tel. Co. v. Central Tel. Co. case, 171 Fed. Rep. 130, a case greatly relied on by my learned brother, that while the above is true as to railroads, it does not apply to telegraphs and telephones, and especially does not apply to the latter because telephone service and railroad service are so different that the rule applied to one does not necessarily apply to another. That the physical differences are present, I admit, but I deny that this changes the principle which I think is as applicable to one as to the other. Take the case of a public grain elevator. It must receive, store, handle and transmit the grain of every one who offers it for those purposes. That does not mean Elevator A must allow a rival, Elevator B, to handle the grain of the latter, destined for the latter's customers through Elevator A and to use Elevator A's facilities for that purpose. Elevator A will and it must handle the grain of its rival, when offered to it, just as it does that of any other customer—that and no more.

I do not think any decision of our own appellate courts or of our Supreme Court calls for the interpretation which my learned brother has put on this contract, nor that our statute, properly construed, annuls it. Furthermore, I think a construction of our statute which would compel one company to subject all its facilities to the use of a third party merely because by contract, it had let in another to the enjoyment of them, would violate the constitutional guarantee of protection in the use and enjoyment of one's own property. Telephone and telegraph companies are common carriers *sub modo* only. That they, like railroads, are what are so aptly called public service corporations, is beyond question. But this does not destroy the right of prop-

erty or of contract. The decisions cited from other jurisdictions in support of my brother's contention are not controlling on us and I do not agree to them. The argument, hinted at, more than distinctly made, that in the telephone service, every patron is his own operator, and that all the telephone company does is to put up the poles and wires and install the boxes, and make the talking connection between one patron and another, and that its patrons then become the real operators, is more fanciful than sound. It does not meet the hard fact that without the placing and maintenance of these appliances and means for putting the electric forces at work, one could not send his voice from house to house, from farm to farm, from town to town. It is the placing and maintenance and operating of the plant by the owner that allow patrons to communicate with each other. The company owns the plant, the patrons do not.

I think the contract between the plaintiff and the defendant violated no law, common or statutory, and is a valid one. It is limited both as to duration and place of operation. Defendant is a small local company, a neighborhood line, intended more for neighborhood convenience than profit. It is of a class that deserves promotion. By the contract with plaintiff defendant afforded its patrons access to a territory that without that contract could not have been reached by them. That contract at the time made undoubtedly helped out the small company. If we strike down that contract and allow defendant to avoid it now that it seems profitable to it to do so, the inevitable effect will be to discourage the building and establishing of these small, local companies. As I understand this case, we are far more apt to build up and strengthen a powerful monopoly by striking down this contract than by upholding it.

If defendant breached it, as alleged, it is liable, as in any other such case, for damages in an action at law; or if, as alleged, an action at law does not afford a

complete, an adequate remedy, then equity may be invoked, as here.

Believing that both the argument advanced and the conclusion reached by the majority are wrong, and without attempting further or fuller elaboration of my reasons for so doing, I am compelled to and do dissent.

OSCAR N. BARR, Respondent, v. SILAS LAKE,
Appellant.

St. Louis Court of Appeals, March 8, 1910.

1. **JUSTICES' COURTS: Pleading: Issues.** Where an action is begun before a justice of the peace, the appearance of defendant, who files no pleading, operates as though the general issue were raised at common law.
2. **ACCOUNT STATED: Nature: Items of Debt Merged in: Pleading.** An account stated must be founded on previous transactions of a monetary character creating the relation of debtor and creditor between the parties, and it is in the nature of a new promise, raises a new cause of action and forecloses matters of dispute as to the items thereof which afford the consideration for the new promise, and the law forbids an inquiry into the validity of a portion of the items, except for fraud, accident or mistake—that is to say, the validity of portions of the original account may not be inquired into under a general denial.
3. **———: Issues and Proof: Suit on Original Debt not Maintainable.** One suing on an account stated may show enough concerning the transactions, if necessary, to afford a foundation for the settlement and to explain it, but he cannot afterwards abandon the account stated and sue on the original subject-matter.
4. **———: ———: Pleading: General Issue at Common Law and Under Code.** Under the form of *non assumpsit*, which raised the general issue at common law, the defendant might show the items which formed the basis of the account stated were incorrect; but the general denial under the Code is a mere traverse of the material facts pleaded in the petition, and under it defendant may disprove such matters only as are essential to sustain plaintiff's case.

Barr v. Lake.

5. ———: ———: ———: General Denial: What May be Shown Under. A defendant in an action on an account stated may show, under a general denial, that there was actually no account between the parties, and that he had had no dealings at any time with plaintiff, and thus destroy the entire cause of action relied on.
6. PLEADING: General Denial: What May be Shown Under. Under a general denial, it is competent to prove any facts going to show that plaintiff never had any cause of action.
7. ACCOUNT STATED: Pleading: Falsifying Account. A defendant in an action on an account stated, in the absence of fraud affirmatively appearing, must specifically plead the fraud, accident or mistake relied on to surcharge or falsify the stated account.
8. PLEADING: Special Defenses. A defense not admissible under the general denial must as a general rule be pleaded.
9. ACCOUNT STATED: Evidence: Proof of Payments Ante-dating Settlement Incompetent. A defendant in an action on an account stated, based on transactions wherein defendant had received from plaintiff telephone equipments and cash, may not, under a general denial, prove that plaintiff owed him a considerable amount for telephone service furnished prior to the alleged settlement; for any proof of payment, to be competent, must necessarily postdate the alleged settlement.
10. JUSTICES' COURTS: Set-off and Counterclaim: Must be Pleaded. Under section 4078, Revised Statutes 1899, providing that no set-off or counterclaim not pleaded before the justice shall be pleaded in the appellate court, a set-off or counterclaim not pleaded in justice's court can not be shown in the circuit court on appeal.

Appeal from Lewis Circuit Court.—*Hon. Charles D. Stewart*, Judge.

AFFIRMED.

W. A. Mussetter and Clay & Johnson for appellant.

(1) In an action on a stated account or claim, while the defendant will not be allowed to go behind the settlement to open up the whole merits of the antecedent transaction, yet he may introduce evidence respecting the earlier transactions to show whether

there was a foundation for the settlement. *Koegel v. Givens*, 79 Mo. 77; *Railroad v. Kimmel*, 58 Mo. 84. In an action on a stated general account, under a general denial, evidence is admissible tending to disprove the existence of the account or that there had been no dealings between the parties. *Brewing Co. v. Berney*, 90 Mo. App. 96. (2) Evidence was admissible to prove an agreement to the effect that the \$50 transferred by plaintiff to defendant and the telephone services furnished by defendant to plaintiff were to be credited the one against the other, or, in other words, that one was to be treated as payment of the other. Under such evidence, the value of the telephone service furnished by defendant to plaintiff from February 4, 1904, to April 1905, at least, would operate as a part payment of the \$50. *Rider v. Culp*, 68 Mo. App. 527; *Land Co. v. Rhodes*, 54 Mo. App. 129; 18 Am. and Eng. Ency. Law (1 Ed.), p. 186. (3) Evidence of the telephone service furnished by defendant to plaintiff from February 4, 1904, to April, 1905, at \$1 per month, is admissible, in connection with the agreement sought to be introduced by defendant to that effect, to show that it was to be treated as a credit or payment on the \$50 above referred to. This evidence, not being introduced to prove a counterclaim, but to prove payment, is admissible under defendant's plea of general denial. Where the action originated before a justice of the peace, payment, though other than in money and resting on an independent agreement, may be shown by the defendant under his plea of general denial. *Rider v. Culp*, 68 Mo. App. 527. Where no answer is filed in an action originating before a justice of the peace, the case stands as though the defendant had answered by a general denial. *Schmidt v. Rozier*, 121 Mo. App. 306. (4) The verdict is not supported by the evidence. The specific transaction or cause of action set out in the petition, not being supported by the evidence, the judgment should be reversed. *Schmeiding v. Ewing*, 57 Mo.

78; *Marcum v. Smith*, 26 Mo. App. 460; *Robbins v. Railroad*, 34 Mo. App. 609; *Spiro v. Transit Co.*, 109 Mo. App. 1.

N. W. Simpson for respondent.

NORTONI, J.—This is a suit on an account stated. The plaintiff recovered and defendant appeals.

It is alleged, substantially, that plaintiff and defendant had certain business transactions in April, 1902, as a result of which defendant received from the plaintiff certain telephone equipments and the sum of fifty dollars in cash. And that afterwards, in February, 1904, they settled their accounts and agreed upon a balance of sixty dollars being due from defendant to the plaintiff thereon, which sum of sixty dollars defendant promised to pay plaintiff. The testimony on the part of plaintiff tends to prove the cause of action stated. It is true the plaintiff gave no evidence as to the items of the account, his entire testimony going to the effect there was an unsettled account between the parties and that they met and agreed upon the balance of sixty dollars due from defendant to him which sum the defendant agreed and promised to pay. The cause of action having originated before a justice of the peace, no formal pleading was filed on the part of the defendant. The defendant gave testimony to the effect that there had been no settlement of accounts between the parties and no promise to pay. As to this matter, he denied the plaintiff's theory of the case *in toto*. However he admitted having received fifty dollars from the plaintiff at the time mentioned in the complaint but sought to deny that he had ever received any telephone equipments from him and sought, too, to give evidence with respect to certain matters of account for telephone service and otherwise which he claimed plaintiff owed him prior to the alleged settlement or statement of the account between them. All of this testimony the court

excluded on plaintiff's objection. The principal point relied upon for a reversal of the judgment relates to the action of the court in excluding so much of the defendant's testimony as tended to prove he had received no telephone equipments from the plaintiff.

It is argued that as our courts have said the transactions prior to the settlement may be referred to by plaintiff as a foundation for the settlement and in order to explain it, it was error to exclude the defendant's offer of proof to the effect that he had received no telephone equipments from the plaintiff said to have been one of the items of the account adjusted. In view of the pleadings, we believe this argument to be unsound. No pleading whatever was filed on the part of the defendant, and the case having originated before a justice of the peace, the defendant's appearance to the action operated as though the general issue were raised at common law. [Kane v. McCown, 55 Mo. 181; Schmidt v. Rozier, 121 Mo. App. 306, 98 S. W. 791; Farmers Bank v. Williamson, 61 Mo. 259.]

It is certain that an account stated must be founded on previous transactions of a monetary character creating the relation of creditor and debtor between the parties thereto. [1 Am. and Eng. Ency. Law (2 Ed.), 440.] In view of this fact, the courts permit a plaintiff suing on an account stated to show enough concerning the earlier transactions, between the parties, if necessary, to afford a foundation for the settlement and in order to explain it. However, in such actions the plaintiff will not be permitted to abandon the cause of action, that is, the account stated, and fall back upon the original subject-matter, for having sued upon a stated account, he must recover on that or not at all. He may refer to the transactions prior to the statement of the account for the purpose only of showing that there was an account existing between the parties and that it afforded a competent basis for the settlement out of which the new cause of action arises.

[Cape Girardeau, etc., R. R. Co. v. Kimmel, 58 Mo. 82; Koegel v. Givens, 79 Mo. 77.] The theory of the law is that an account stated is in the nature of a new promise or undertaking and raises a new cause of action between the parties. [1 Am. and Eng. Ency. Law (2 Ed.), 456; Cape Girardeau, etc., R. R. Co. v. Kimmel, 58 Mo. 82; Koegel v. Givens, 79 Mo. 77; Columbia Brewing Co. v. Berney, 90 Mo. App. 96; Burger v. Burger, 34 Mo. App. 153.]

In view of the principle thus established, the law forbids an inquiry into the validity of the items composing the original cause of action, which question is merged in the new promise on the stated account, except upon valid grounds affording relief in other contractual matters such as fraud, accident or mistake. The very purpose of an account stated is to foreclose matters of dispute with respect to the various items thereof which afford the consideration for the new promise involved in the stated account, and, therefore, the law forbids an inquiry into the validity of a portion of the items of which the original cause of action was composed unless it be on the grounds of fraud, accident or mistake. That is to say, the validity of portions of the original account may not be inquired into under a general denial. [Columbia Brewing Co. v. Berney, 90 Mo. App. 96; 1 Ency. Pl. and Pr., 89; Martin v. Beckwith, 4 Wis. 219; Warner v. Myrick, 16 Minn. 91; Moody v. Thwing, 46 Minn. 511; 1 Am. and Eng. Ency. Law (2 Ed.) 456.] The leading authority relied upon by the defendant in the argument here is Koegel v. Givens, 79 Mo. 77, 79. That was a suit on an account stated. The principle we have sought to illustrate was not only recognized in that case but enforced by the Supreme Court as well, for there it appeared the plaintiff was permitted to give testimony tending to show that he had performed work and labor for the defendant and the account was afterwards stated between them. The defendant proffered

testimony to the effect that the work and labor performed by plaintiff was without value and this the court rejected. The Supreme Court said the proof was competent in so far as plaintiff was concerned as it merely served as a matter of inducement to show that there was a foundation for a settlement between the parties, but the proof proffered on behalf of defendant to the effect that the labor performed by the plaintiff was without value was incompetent for the reason that it tended to open up the merits of the antecedent transaction. Although the matter of the pleadings is not mentioned in that case, it appears the common law general issue was raised, as the proceeding originated before the justice of the peace and no answer was filed. It would seem in that case the proof rejected should have been received under the common law general issue but it was not, and the Supreme Court declared it incompetent. This ruling, we believe, curtailed the scope of the general issue in so far as suits on account stated are concerned and the case is a precedent by which we are bound. Under the form of *non assumpsit*, which raised the general issue at common law, the defendant might show the items which formed the basis of the account stated were incorrect. The question has been squarely met and decided by a common law court of high authority. [Thomas v. Hawkes, 8 M. & W. 140; 1 Ency. Pl. and Pr., 89.] Such evidence was admissible under the common law general issue because everything was open to proof on the part of defendant under that plea which tended to show a defense. [Northrup v. Mississippi, etc., Ins. Co., 47 Mo. 435.] In this respect the general denial under the code is not so comprehensive. Under the modern general denial, the defendant may disprove only such matters as are essential to sustain the plaintiff's case. Such plea is a mere traverse in bar of the material facts pleaded in the petition. [Northrup v. Mississippi, etc., Ins. Co., 47 Mo. 435, 444; 1 Ency. Pl. and Pr., 816, 817.]

However, notwithstanding the more extensive scope of the plea of the general issue at common law and the competency of proof thereunder, which may not be given under the code general denial, and notwithstanding the fact that the common law general issue is raised by the appearance of the defendant before a justice of the peace when no answer is filed, it appears our Supreme Court has furnished a precedent for applying the doctrine of the general denial to suits on account stated arising before the justice when no answer is filed. In other words, the Supreme Court in *Koegel v. Givens*, 79 Mo. 77, 79, ruled in a case originating before the justice on a stated account and in which no answer was filed that proof proffered by the defendant tending to show the validity of items of the account stated was incompetent. This case is a precedent by which we are concluded under the Constitution.

We believe there can be no doubt in a case such as this one, where the defendant denies there has been an account stated and the promise to pay it, by interposing a general denial, that he may introduce any evidence thereunder which shows that there was actually no account between him and the plaintiff and that he had no dealings at any time with him. The principle is that which permits the defendant to show under the general denial any fact which goes to disprove the plaintiff's cause of action. Indentically as the defendant may show that there was no settlement of the accounts between the parties and, therefore, no new promise, he may show, too, that he never had any dealings whatever with the plaintiff and that there was actually no account between them to settle, for such goes to destroy the entire cause of action or the very foundation of the cause of action relied upon. [*Columbia Brewing Co. v. Berney*, 90 Mo. App. 96, 99; *Field v. Knapp*, 108 N. Y. 87, 89; 1 Enc. Pl. and Pr., 89, 90.] It is always competent to prove any fact under the general denial which goes to show that plaintiff never had any cause of ac-

tion. [Hoffman v. Parry, 23 Mo. App. 20; Northrup v. Mississippi, etc., Ins. Co., 47 Mo. 435-444; Greenway v. James, 34 Mo. 326, 328; 1 Enc. Pl. and Pr., 817.]

But in this case the defendant did not seek to show that there had been no dealings whatever and that no account existed between the parties which might afford a basis for the settlement. On the contrary, he admitted having received the fifty dollar item referred to and sought only to impeach the one item with respect to the telephone equipments which his counsel says he did not receive. To permit this proof, operates to again open up the merits of the controversy which is presumed to have been included and settled in the stated account. If a defendant is overreached in a settlement by having been induced through fraud, accident or mistake to agree to pay for an item which he had not received, then he is entitled to relief to that extent under a competent pleading to falsify the account. And in the absence of fraud affirmatively appearing, it devolves upon the defendant to specially plead the fraud, accident or mistake relied upon to the end of surcharging or falsifying the stated account, for the plaintiff is entitled to notice of the special defense relied upon. [Columbia Brewing Co. v. Berney, 90 Mo. App. 96; Martin v. Beckwith, 4 Wis. 219; Warner v. Myrick, 16 Minn. 91; 1 Enc. Pl. and Pr. 89; 1 Am. and Eng. Ency. Law, 460, 461, 462, 463.] The general rule is that any defense not admissible under the general denial must be pleaded. [1 Ency. Pl. and Pr. 89.]

The defendant sought to introduce evidence tending to prove that the plaintiff owed him a considerable amount for telephone service furnished by defendant to the plaintiff for some two or three years prior to the alleged settlement of accounts between the parties. This evidence was excluded. It is argued this ruling was error for the reason defendant sought thereby to show the account had been paid by the rendering of such telephone service prior to the alleged settlement

in which the balance of sixty dollars was found to be due the plaintiff. This proof in no manner met the issue involved which was as to whether or not the running account between the parties was settled in February, 1904, as alleged by the plaintiff, and the defendant promised to pay the balance found to be due. The action on the stated account, as said before, is on a new promise into which all prior transactions are merged. All of this matter pertaining to an indebtedness from the plaintiff to defendant is presumed to have been reckoned with and balanced off at the time of the settlement between the parties. Any proof of payment, to be competent, must therefore necessarily post-date the alleged settlement. For the transactions prior thereto must be regarded as having been merged in the settlement of the stated account. [Columbia Brewing Co. v. Berney, 90 Mo. App. 96, 99.]

Defendant sought to introduce testimony to the effect that plaintiff owed him about fourteen dollars for telephone service rendered to the plaintiff since the date of the alleged settlement. The court excluded this evidence. There was certainly no error in this, as no set-off or counterclaim was filed in the case. Our statute provides no set-off or counterclaim may be pleaded in the circuit court that was not pleaded before the justice. [Sec. 4078, R. S. 1899; see also Compton v. Parsons, 76 Mo. 455.]

The judgment should be affirmed. It is so ordered. All concur.

**THEODORE J. HAHS, Respondent, v. CAPE GIRAR-
DEAU & CHESTER RAILROAD COMPANY
and THE CHESTER, PERRYVILLE & STE.
GENEVIEVE RAILWAY COMPANY, Appel-
lants.**

St. Louis Court of Appeals, March 8, 1910.

1. **CONTRACTS: Receipts: Contradiction: Evidence.** While a mere receipt is open to parol examination and modification, where a writing contains a contract as well as a receipt, so much of it as imports the contractual obligation may not be contradicted or overthrown by parol testimony.
2. **RELEASES: Contradiction: Evidence.** Where the words "in full release of all damages sustained March 31, 1906," were written on a pay roll above plaintiff's signature, and plaintiff, in consideration thereof, was paid a sum of money, such writing was not only a receipt but also a release of plaintiff's right of action; and, in the absence of pleadings properly repudiating its execution, it could not be contradicted by parol.
3. **———: Situation of Parties: Evidence.** Parol evidence tending to advise the court of the situation of the parties at the time a release for damages is executed and the circumstances under which it was given is competent.
4. **CONTRACTS: Pleading: General Denial: What May be Shown Under.** Generally speaking, in an action on a contract, under a general denial it may be shown that no contract whatever was made; but such may not be allowed when the contract is one which is confessed as a matter of law by failure to plead *non est factum* under oath.
5. **PLEADING: Instrument in Writing: What Is, Under Statute.** Where an injured person signed a pay roll and over his signature appeared the words, "in full release of all damages sustained March 31, 1906," such writing constituted "an instrument in writing" within the contemplation of section 746, Revised Statutes 1899.
6. **———: ———: Denial Under Oath: Effect of Failure.** Where a release is pleaded in the answer, and a copy of same is filed therewith, the failure of plaintiff to deny its execution under oath, as provided by section 746, Revised Statutes 1899, amounts to a confession by plaintiff of the manual execution of the instrument, which includes both the act of signing and delivering it.

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7. ———: ———: ———: ———: Instrument Signed by Both Parties. Section 746, Revised Statutes 1899, which provides that a written instrument pleaded shall be deemed confessed unless denied by a verified pleading of the opposite party, does not apply to instruments signed by both parties.
8. **APPELLATE PRACTICE: Reversal and Remand Rather than Outright Reversal: Requirements of Justice.** Where defendant pleads a release in the answer to the cause of action asserted in the petition and plaintiff does not in his reply deny under oath the execution of the release, although its execution was technically confessed, under the pleadings, the judgment will not be reversed outright, but will be reversed and the cause remanded in the interest of justice, it appearing from the proof that plaintiff has a meritorious cause of action and the aspect of the case presented being attributable to the erroneous ruling of the court on the question, when, had he ruled correctly, plaintiff might have avoided the predicament by amendment.
9. **RAILROADS: Leases: Liability of Lessor: Statutory Authority.** It is true as a general proposition that an incorporated railroad company may not lease its property and franchises to another and thus escape liability for injuries resulting from the operation of its road; but this rule does not obtain when the legislative authority has consented to the lease, without reserving the liability of the lessor by appropriate words to that effect.
10. ———: ———: ———: ———: Lease to Foreign Company. It is only where a domestic railroad company leases its road to a foreign corporation that section 1060, Revised Statutes 1899, continues a liability against the lessor for the negligence of the lessee in the operation of the property.
11. ———: ———: ———: ———: Term "Lease" Construed. The word "lease" as used in section 1060, Revised Statutes 1899, authorizing railroad leases, contemplates such an instrument as divests the lessor of possession and control and places the same in the lessee to the exclusion of the lessor, possessing all the qualities and incidents of a lease at common law between landlord and tenant.
12. **LANDLORD AND TENANT: Repairs: Landlord's Liability.** At common law, in the absence of a covenant in a lease, the landlord, having delivered the demised property in a sound state of repair, was neither liable to make repairs during the term nor entitled to enter the premises for that purpose.
13. **RAILROADS: Leases: Liability of Lessor: Defective Construction.** If a lessor railroad company's tracks were defective at the time the lease was executed, as a result of negligent con-

struction, and continue in that condition through the default of the lessee, liability for an injury resulting therefrom would not only attach to the lessee company, but would attach to the lessor company as well, on the theory such construction would be viewed by the law as a nuisance.

14. ———: ———: ———: **Facts Stated.** Where a domestic railroad company, in pursuance of section 1060, Revised Statutes 1899, leased its property to another domestic railroad company, its roadbed and track being sound and secure at the time the lease was executed, and the lessee allowed the track to get out of repair, the lessor was not liable for injuries sustained by an employee of the lessee as a result of the defect in the track.

Appeal from Cape Girardeau Circuit Court.—*Hon. Henry C. Riley*, Judge.

REVERSED AND REMANDED AS TO CHESTERVILLE, PERRYVILLE AND STE. GENEVIEVE RAILWAY COMPANY.

REVERSED AS TO CAPE GIRARDEAU AND CHESTER RAILROAD COMPANY.

Giboney Houck, R. G. Ranney and Benson C. Hardesty for appellants.

(1) The court erred in overruling the objection to the admission of any evidence and in overruling the motion for judgment on the pleadings, and in overruling the motion in arrest. A full release and quittance of plaintiff's cause stood confessed in the pleadings. (a) A full release and quittance was pleaded and described in the answer and it stood confessed as it was pleaded and described. Sec. 746, R. S. 1899; *Johnson v. Sov. Camp W. O. W.*, 119 Mo. App. 98; *State to use v. Chamberlin*, 54 Mo. 338; *Love v. Life Ins. Co.*, 92 Mo. App. 192; *Campbell v. Harrington*, 93 Mo. App. 322; *McGill v. Wallace*, 22 Mo. App. 683; *Bates v. Scheik*, 47 Mo. App. 642. (b) Furthermore, the release itself showed on its face that it was a full quittance of the cause and a valid instrument within the scope and meaning of said section 746. 9 Cyc. 577, 579, 584, 585, 586; *Donnell Mfg. Co. v. Repos*, 75 Mo. App. 420; *Bonnewell v. Nels*

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Jacobson, 5 L. R. A. (N. S.) 436 (Iowa); Monmouth Park Ass'n v. Wallace Iron Works, 19 L. R. A. 456; Ferry Company v. Railroad, 128 Mo. 224; Horn v. Hausen, 22 L. R. A. (Minn.) 617; Puff v. Puff, 104 S. W. (Ky.) 332; Rowland v. St. L. & S. F. R. R. Co., 124 Mo. App. 605; Squires v. Amherst, 145 Mass. 192; Tanner v. Merrill, 31 L. R. A. (Mich.) 171; Earle v. Berry, 1 L. R. A. (N. S.) 867; Indianapolis R. Co. v. Houlihan, 54 L. R. A. 737; Paris Mfg. Co. v. Carle, 92 S. W. 748; Railroad v. Craig, 98 S. W. 907. (c) No defense was pleaded to said release. Sec. 604, 607, 609 R. S. 1899; Kellerer v. Henderson, 203 Mo. 511; Richey v. Insurance Co., 98 Mo. App. 124; Smith v. Rembaugh, 21 Mo. App. 390; Johnson v. Sov. Camp W. O. W., 119 Mo. App. 98; Thomas v. Life Ins. Co., 73 Mo. App. 374; Wells v. Hobson, 91 Mo. App. 389; Merrill v. Trust Co., 46 Mo. App. 236; Saville v. Hoffstetter, 63 Mo. App. 273. (2) The court erred in admitting testimony as follows: (a) Testimony which tended to deny the execution of the release pleaded in the answer. (See point 7, Subdivision (1) and authorities cited thereunder); Smith v. Rembaugh, 21 Mo. App. 390. (b) Testimony tending to show that the release had been fraudulently procured. No fraud had been pleaded in the replication or elsewhere. (See point 7, Sub. Div. (2) and authorities cited thereunder); State ex rel. v. Stuart, 111 Mo. App. 498; Wojtylack v. Coal Co., 188 Mo. 293; Rowland v. Railroad, 124 Mo. App. 605; Kerr on Fraud and Mistake p. 365, sec. 8. No return or offer to return the consideration paid plaintiff for said release had been pleaded, nor had it been shown in evidence; the evidence showed the reverse. 18 Ency. Pl. and Pr., p. 829-835; Edwards v. Morris, 1 Ohio 524; Godding v. Decker, 3 Colo. App. 198; Reddish v. Smith, 10 Wash. 178; Robertson v. Fuller Constr. Co., 115 Mo. App. 465; Lomax v. Railroad, 119 Mo. App. 192; Althoff v. St. Louis Transit Company, 204 Mo. 166; McNealey v. Baldridge, 106 Mo. App. 11; Retzer v. Dodd P. Co., 58 Mo. App. 270; Och v. Rail-

road, 130 Mo. 27; Kingman-Moore I. Co. v. Ellis, (Mo.) 103 S. W. 127; Saulsbury v. Brown, P. B. & Co., (Ark.) 104 S. W. 257; Cobb v. Hatfield, 46 N. Y. 533; Ins. Co. of N. Y. v. Howard, 111 Ind. 544; Railroad v. Hayes, 83 Ga. 558; Gould v. Bank, 86 N. Y. 75. (3) As to defendant Cape Girardeau & Chester R. Co., said demurrer should have been sustained for the still further reason that the evidence showed plaintiff was never in the service of said defendant. Sec. 1060, R. S. 1899; Thomas v. Railroad, 101 U. S. 83; Miller v. Railroad, 125 N. Y. 123; 2 Wood on Railways, sec. 325, p. 1338; Hoff v. Railroad, 14 Fed. Rep. 558; Arrowsmith v. Railroad, 57 Fed. Rep. 165; Railroad v. Curl, 28 Kansas 622; Mahoney v. Railroad, 63 Me. 69; Nugent v. Railroad, 80 Me. 62; Markey v. Railroad, 185 Mo. 348; Moorshead v. United Ry. Co., 203 Mo. 121. (4) The petition fails to state a cause of action v. Cape Girardeau & Chester R. Company. Plaintiff pushes himself out of court by alleging that both defendants are domestic corporations, and that Cape Girardeau & Chester R. Co., had leased the road to Chester, Perryville & Ste. Genevieve Ry. Co. and was not operating same, but that same was being operated by said Chester, Perryville & Ste. Genevieve Ry. Co. See cases cited under sub. div. (3) of Point 3, supra); Hoffman v. McCracken, 168 Mo. 343; Megher v. Stewart, 6 Mo. App. 498.

Edw. D. Hays for respondent.

(1) There was no verbal agreement that plaintiff would release defendants from liability for damages if replaced on the pay roll; nor was there any such written agreement embodied in the receipt signed at the time the \$12.50 was paid. The money was paid and received for another purpose. It would have been unjust to deduct from plaintiff's damage claim the \$12.50 paid for another purpose. Instruction number eight was properly given. R. S. 1899, sec. 654. The receipt for time allow-

ed, not being a release, did not extinguish the pre-existing right to damages. Accord and satisfaction for time allowed does not bar recovery for damages. Plaintiff is not seeking to rescind any agreement actually made. 1 Cyc., p. 308; 19 Am. and Eng. Ency. Law (1 Ed.), 1113. (2) The court properly overruled motion for judgment on the pleadings; and properly overruled demurrer to the evidence; and properly gave instructions one, five and seven, for plaintiff. The only penalty for failing to plead *non est factum* is a confession of the "Instrument." R. S. 1899, sec. 746. Confession does not enlarge the vigor of the writing. A receipt, though expressed to be in full of all demands, has no contractual elements, but is open to parol explanation, and at most is but prima-facie evidence of the facts stated. It has no such sanctity as to make it conclusive if good reason appears for holding otherwise. Ireland v. Spickart, 95 Mo. App. 53; Aull v. Trust Co., 149 Mo. 1. Under a general denial the defending party may show that the instrument has been materially altered since delivery. 9 Cyc., pp. 734-735. (3) A release of one joint wrongdoer "Executed before trial" does not relieve the other joint wrongdoer unless such release is specially pleaded. The Cape Girardeau and Chester Railroad Company did not so plead. Release must be specifically pleaded by defendant seeking its benefit to avoid the plaintiff's right to controvert the same under general denial. 1 Cyc., pp. 341-346. (4) A lessor is liable for the acts of the lessee railroad. Instruction number four was properly given; defendants are wrong in their contention that a demurrer to the evidence should have been sustained on account of plaintiff being an employee of the lessee company; the general statutes fix this liability. R. S. 1899, sec. 1060; Brown v. Railroad, 27 Mo. App. 394; McCoy v. Railroad, 36 Mo. App. 445; Price v. Railroad, 70 Mo. App. 175; St. Clair v. Railroad, 70 Mo. App. 589; Markey v. Railroad, 185 Mo. 348; Dean v. Railroad, 199 Mo. 398. (5) Defendants cannot

shield themselves behind thir own fraud. The evidence is strongly conclusive that after the receipt was signed it was tampered with and interlined. *Cottriell v. Krum*, 100 Mo. 397; *Judd v. Walker*, 114 Mo. App. 128. The rule is now firmly established that any alteration of a paper without the consent of all parties vitiates the writing. 9 Cyc., p. 635; *Morrison v. Garth*, 78 Mo. 434; *Higgins v. Harvester Co.*, 181 Mo. 300.

NORTONI, J.—This is a suit for damages accrued to the plaintiff through the alleged negligence of the defendants. Plaintiff recovered and both defendants appeal.

The defendants are domestic corporations, that is to say, they are each railroad companies incorporated and existing under the laws of this State. They own connecting lines of railroads in southeast Missouri. The defendant, Cape Girardeau & Chester R. R. Co., owned the railroad on which the plaintiff received his injury. It was being operated, however, at the time by the other defendant, The Chester, Perryville & Ste. Genevieve Ry. Co., in whose employ the plaintiff was engaged as a laborer on its section.

It is conceded throughout the case that the Chester, Perryville & Ste. Genevieve Ry. Co., lessee, was operating over the tracks of the Cape Girardeau & Chester R. R. Co., lessor, under a competent lease authorized by the statutes of the state, which in no manner reserved a liability against the lessor company for the torts of the lessee.

While the plaintiff was in the employ of the defendant, Chester, Perryville & Ste. Genevieve Ry Co., the lessee, as a section hand, he was injured through the derailment of a box car in which he and other section men were being transported by that company over the tracks of the other defendant, The Cape Girardeau & Chester R. R. Co., lessor. The plaintiff and his companions, in charge of their foreman, had been engaged

during the day in work extra of their regular employment, at a point on the railroad several miles distant from the section on which he was employed, and having finished the day's labor, was being transported homeward by his employer, the defendant, Cape Girardeau, Perryville & Ste. Genevieve Ry. Co., over a portion of the tracks owned by the other defendant, the lessor company. The men were all in an empty box car being propelled backwards by a locomotive engine owned by his employer, the lessee company. Upon approaching a trestle over a ravine on the road of the Cape Girardeau & Chester R. R. Co., the lessor, the box car was derailed because of a defect in the lessor's tracks adjacent to the trestle. As a result of the derailment, plaintiff was precipitated against the side of the car, which resulted in dislocating his shoulder and inflicting some other slight bruises. The particular negligence relied upon for a recovery relates to the defective track mentioned. The proof shows that the roadbed had settled considerably at the point where the railroad dump abuts the north end of the trestle and that within a space of about five feet the incline from the railroad dump to the end of the trestle was about fourteen inches. Besides, on one side of the track at this point, there was a joint in the rails, which appears to have been sunken more than the rail on the opposite side. The box car, moving at the rate of about eight miles an hour, upon reaching the point mentioned, was derailed because of the low joint and the sharp and extensive incline in the track adjacent to the trestle. There is no complaint whatever as to a defective car nor as to the mode or manner in which the car or locomotive was being operated. The charge of negligence relates solely to the defect in the track of the lessor, and it appears that the track had thus become defective while in the possession and under the control of the lessee. While the lease itself is not before us, there is nothing in the record indicating that the lessor company covenanted to maintain or repair

the tracks or roadway. All that appears as to this matter is to the effect that the lessee had been operating the road for a considerable period of time under the lease and that it had from time to time been making repairs on the leased road as though the obligation to do so rested upon it and not upon the lessor.

The defendants answered separately. Among other things, the Chester, Perryville & Ste. Genevieve Ry. Co., that is the lessee, or operating company, admitted the plaintiff's injury and pleaded an accord and satisfaction of the cause of action stated in the petition. In other words, it pleaded a full acquittance and release executed by the plaintiff in writing on the 19th day of May, 1906, wherein it is recited plaintiff accepted \$12.50 from defendant and in consideration thereof executed a release on its pay roll of the cause of action sued on as follows: "In full release of all damages sustained March 31, 1906" and signed and delivered the same to the defendant by affixing his signature to line 16 of its pay roll opposite the words quoted. This defendant also filed the original page of its pay roll, relied upon, containing the release of the plaintiff's cause of action mentioned, which page and line 16 thereof evinced in writing that plaintiff had received on the date mentioned \$12.50 "in full release of all damages sustained March 31, 1906, (Signed) Theodore Hahs." The defendant, Cape Girardeau & Chester R. R. Co., the lessor, answered by a general denial, specially denied that plaintiff was in the services at the time he was injured and pleaded further that it had long prior to that date leased its railroad to the other defendant, The Chester, Perryville & Ste. Genevieve Ry. Co., who was in full possession of and operating the same at the time plaintiff received his injury. To each of these answers the plaintiff filed a general denial only, without verification. The case coming on for trial, defendants objected to the introduction of any testimony by plaintiff for the reason the answer of the Chester, Perryville & Ste. Genevieve Ry.

Co. pleaded a full release and acquittance of the cause of action, executed by plaintiff to it in consideration of \$12.50, which stood confessed in the case for the reason plaintiff had failed to plead *non est factum* thereto by denying the same under oath, as is required by our statutes, section 746, Revised Statutes 1899, section 746, An. St. 1906. The court overruled the objection and expressed the opinion that the release pleaded in and filed with the answer was not such an instrument in writing as is contemplated by that statute, to which ruling the defendants excepted. The same objection and the same ruling were repeated upon several occasions throughout the trial. Notwithstanding the fact that the execution of the release pleaded in the answer was not denied under oath by the plaintiff, the court permitted evidence to be adduced tending to prove the release mentioned was a forgery. Plaintiff himself testified that the defendant paid him \$12.50, as recited in the pay roll, and that he had performed no labor at the time for which he had not been paid. Over defendants' exception, plaintiff said the defendant carried his name on the pay roll as a cripple and paid him the \$12.50 as a donation during the time he was disabled; that he signed the pay roll on the date mentioned and received a check for the amount referred to as a gift. He insists, however, that at the time of signing the pay roll, the words of release therein appearing at the time of the trial were not then present and says the words, "In full release of all damages sustained March 31, 1906," were written opposite his signature at some time after he signed the receipt. Several other witnesses, who were present when the pay roll was signed by the plaintiff and who signed a receipt on the same page for their wages, said that they did not observe the words, "In full release of all damages sustained March 31, 1906," opposite plaintiff's name at the time. Some of these witnesses affixed their signatures to the pay roll immediately before and some immediately after the

plaintiff. This testimony was all received over defendants' exception.

It appears, too, the words, "In full release of all damages sustained March 31, 1906," were written on the pay roll in small but legible letters in red ink and the fact that red ink was used is a circumstance likely to attract attention. One witness, besides the plaintiff, says positively that he looked over the pay roll at the time it was signed and knows the words of release in red ink were not then present.

It is argued by the plaintiff that the instrument relied upon as a release amounts only to a receipt and that as the penalty imposed by section 746, Revised Statutes 1899, for not denying its execution under oath is a confession of the instrument, he is not precluded thereby from contradicting the same by parole. The court proceeded on this theory and instructed the jury that although a receipt may, of itself, indicate a settlement, yet it is not conclusive evidence of such settlement but may be explained or rebutted by verbal testimony. The theory of the instruction is unsound in its application to the instrument in evidence, for it contains a contract as well as a receipt. It is very true that a mere receipt is not conclusive against an attack by parole. The law affords no special sanctity to a receipt as such. A receipt is merely the evidence of a fact and is, therefore, open to parole explanation and modification. [Aull v. St. Louis Trust Co., 149 Mo. 1, 17, 50 S. W. 289; Dawson v. Wombles, 111 Mo. App. 532, 86 S. W. 271; 23 Am. and Eng. Ency. Law (2 Ed.), 978, 979; 24 Am. and Eng. Ency. Law (2 Ed.) 283.] However this may be, the law affords immunity from parole attack to contractual obligations reduced to writing by the parties when supported by a sufficient consideration. And although a writing may be in part a receipt and as such disputable to that extent, if it contains a contract as well, so much of it as imports the contractual obligation may not be contradicted or overthrown by parole testimony. [Car-

penter v. Jamison, 6 Mo. App. 216; Carpenter v. Jamison, 75 Mo. 285; Randall v. Reynolds, 52 N. Y. (Supr. Ct.) 145; 24 Am. and Eng. Ency. Law (2 Ed.), 283; 23 Am. and Eng. Ency. Law (2 Ed.), 978; Davison v. Davis, 125 U. S. 90; Slatterly v. Bates, 8 Mo. App. 595.]

The writing relied upon as a release and confessed to have been executed by plaintiff, as it was, by the failure to deny its execution under oath in the reply, certainly amounts to more than a mere receipt for the \$12.50, which the plaintiff conceded he received and for which he says he performed no labor. It contains besides an admission that he received that amount, a contractual stipulation to the effect that in consideration of its receipt he released the defendant from all damages accrued to him on account of the injury complained of in the petition. It reads, "In full release of all damages sustained March 31, 1906." The express words of release quoted import a contract whereby the defendant surrendered his right of action and under the state of the pleadings confessing its execution, this contract may not be contradicted by parole. [Squires v. Amherst, 145 Mass. 192; Randall v. Reynolds, 52 N. Y. (Supr. Ct.) 145; Carpenter v. Jamison, 6 Mo. App. 216; Carpenter v. Jamison, 75 Mo. 285; Rowland v. St. L. & S. F. R. R. Co., 124 Mo. App. 605, 102 S. W. 19; 24 Am. and Eng. Ency. Law (2 Ed.), 283, 284; 23 Am. and Eng. Ency. Law (2 Ed.), 979.] There was testimony introduced which tended to enlighten the court as to the situation of the parties at the time of the execution of the release and the circumstance under which it was given. From this it appears the plaintiff had performed no labor for the defendant for which he had not been paid theretofore; that his only claim against the defendant for damages sustained March 31, 1906, related to the cause of action stated in the petition. To this extent, and this extent only, the parole evidence, with respect

to the release, was competent under the state of the pleadings, as it tended to endue the court with the situation of the parties and the subject-matter to which the words employed in the writing related. All other testimony tending to contradict the contract contained in the release was incompetent and should have been rejected as the pleadings stood, for the law renders the instrument thus confessed immune from parole contradiction. [Kessler v. Clays, 147 Mo. App. 88, 125 S. W. 799. Generally speaking it may be shown under the general denial that no contract whatever was made (1 Ency. Pl. and Pr. 818), but such certainly may not be allowed when the contract is one of those confessed as a matter of law by a failure to plead *non est factum* under oath.

Defendant having pleaded the release in its answer, as executed by the plaintiff, and filed a copy therewith, it is insisted the court should have directed a verdict for it on the theory that by failing to deny its execution under oath, the plaintiff confessed it as pleaded. We are entirely clear as to the proposition that the release pleaded in the answer as it was is an instrument in writing within the contemplation of our statute, section 746, Revised Statutes 1899, section 746, An. St. 1906. So much of that statute as is pertinent here is as follows:

"When any petition or other pleading shall be founded upon any instrument in writing, charged to have been executed by the other party and not alleged therein to be lost or destroyed, the execution of such instrument shall be adjudged confessed, unless the party charged to have executed the same deny the execution thereof, by answer or replication, verified by affidavit."

Although the plaintiff's replication amounted to a general denial, it was not verified by affidavit, as required by the statute. By omitting a verification by affidavit, the plaintiff confessed the execution of the instru-

Held: *vi* Railroad.

ment pleaded, if it be one contemplated by the statute. The confession thus involved goes to the material execution of the instrument only. By the later decisions of our Supreme Court, this includes a confession to the extent of both signing and delivering the instrument pleaded. [Hart v. Harrison Wire Co., 91 Mo. 414; see also Johnson v. Sovereign Camp of W., 119 Mo. App. 98, 95 S. W. 951; State to the use v. Chamberlin, 54 Mo. 688; Thomas v. Life Ass'n., 78 Mo. App. 871; Love v. Central Life Ins. Co., 92 Mo. App. 192; Campbell v. Harrington, 93 Mo. App. 315; Bates v. Scheiky, 47 Mo. App. 642; McGill v. Wallace, 22 Mo. App. 675; Smith v. Rembaugh, 21 Mo. App. 890.]

As to the suggestion that the release pleaded is not an instrument in writing contemplated by the statute quoted, it may be said that it falls within the very words of the statutory provision, for it is clear that the defense pleaded in the answer is founded thereon. It is true the cases we have examined deal with instruments where affirmative relief has been sought thereon, and none seem to present the identical question where the instrument of writing such as a release is pleaded in bar as here. However, the statute above referred to is but the counterpart of another to be found in section 643, Revised Statutes 1899, Ah. St. 1906, section 643. That statute, so far as is material, is couched in the identical language as section 746, above quoted. It imposes the duty on the pleader of filing with his petition, or other pleading, the instrument of writing on which the cause of action or defense is founded in those cases wherein it is charged to have been executed by the other party. So far as is essential to show that section 746 is its counterpart, section 643 may be quoted as follows:

"When any petition, or other pleading, shall be founded upon any instrument of writing, charged to have been executed by the other party, . . . and not therein alleged to have been lost or destroyed the

same, . . . shall be filed with said petition or other pleading."

It will be observed so much of the statute just quoted is in identical language with the provisions of section 746, and it certainly imposes the duty upon the defendant in this case, relying upon the release in bar of the plaintiff's action, to file the same as it did with its answer, for so much of the answer as pleads the release in bar to the plaintiff's cause of action is founded on that instrument. It appears that the execution of any instrument of writing required to be filed with the pleading by section 643 as the foundation for the right therein asserted, should be treated as confessed under the provisions of section 746, if not denied under oath. Our Supreme Court has treated these statutes as relating to the same subject-matter and pointed out their similarity in *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300. In that case the answer denying the instrument sued upon was unverified and the question was made as to whether or not its execution was for that reason confessed under the statute. The instrument involved was signed by both parties. The court pointed out that as it had been determined that section 643, requiring the instrument on which a pleading was founded to be filed therewith, did not apply to instruments signed by both parties, the same doctrine should obtain with respect to the confession imposed as a penalty for non-verification under section 746.

Although the execution of the release was technically confessed under the pleadings, we believe it would be highly unjust to reverse the judgment outright on that account without affording plaintiff an opportunity to amend. It appears from the proof that plaintiff has a meritorious cause of action and the aspect the case now presents on the state of the pleadings may be attributed to the ruling of the court when the question was raised at the inception of the trial, for had the court ruled otherwise, plaintiff might have avoided his present pre-

dicament by amendment. The evidence tending to prove the words of release were written in the pay roll after plaintiff signed it is clearly competent under the general denial, if properly amended and verified.

Moreover, it seems the voice of justice loudly calls for remanding the case instead of reversing the judgment outright and casting the plaintiff out of court without recompense for his injuries. We have, indeed, a precedent of high and controlling authority for the remand of a cause in the interest of justice when the harsh applications of the law points otherwise. In the *Bank of Commerce v. Bogey*, 44 Mo. 13, a demurrer was sustained to the petition and an appeal was had. The Supreme Court throughout the opinion reasoned the correctness of the action of the trial court in sustaining the demurrer and concluded by saying:

"Though we find no error in sustaining the demurrer, yet, that the issue may be raised as indicated, the judgment will be reversed at the costs of the appellant and the cause remanded."

That case, as this one, presented a situation disclosing that great injustice would result from conclusively casting the plaintiff for a mere erroneous conception of the theory of the law. See, also, *Rowland v. St. L. & S. F. R. R. Co.*, 124 Mo. App. 605, 102 S. W. 19. Besides, the public policy of the state, as declared in sections 865 and 659, Revised Statutes 1899, An. St. 1906, section 865, 659 we believe, forbids the outright reversal of judgments in meritorious cases on a mere technical matter of procedure in no way affecting the merits of the action.

Aside from all other questions, it appears that there is no liability on the part of the Cape Girardeau & Chester R. R. Co., the lessor, for the injury inflicted upon the plaintiff through the negligence of the lessee. It is entirely true as a general proposition that an incorporated railroad company may not lease out its property and franchises to another and thus escape liability for

injuries resulting from the operation of its road. [Thomas v. R. R., 101 U. S. 71.] But this doctrine does not obtain when the legislative authority of the state has consented to the lease without reserving the liability of the lessor by appropriate words to that effect. [Moorshead v. United Rys. Co., 119 Mo. App. 541, 98 S. W. 261; Moorshead v. United Rys. Co., 203 Mo. 121, 100 S. W. 611.] The two defendants being domestic corporations, owning connecting roads, both situate in the state, the legislative authority has expressly authorized the leasing of the one to the other without in any manner signifying an intention that the lessor company shall remain liable after the lease is executed for the torts of the lessee over which it has no control. [Sec. 1660, R. S. 1899.] It is only where a domestic railroad company leases its road to a foreign corporation of like kind that the statute referred to continues a liability against the lessor as though it continued to operate the property. This reservation of liability against the domestic company after leasing to a foreign corporation proceeds, we believe, on the theory that there shall remain a responsible party within the jurisdiction of the state to answer for such torts and defaults as may be committed in the operation of the road which the state has chartered. [Markey v. Louisiana, etc., R. R. Co., 185 Mo. 348, 84 S. W. 61; Smith v. Pac. R. R., 61 Mo. 17.] The reason for the rule of the statute in this respect does not obtain when both are domestic corporations owning railroads exclusively within the state. There can be no doubt that the authority conferred upon one domestic railroad to lease to another, under our statutes, without words expressive of a liability otherwise, confers authority to transfer, for the period of time stipulated, possession and control of the property to the lessee. The authority implied in the word, "lease," under such circumstances, authorizes such an instrument as divests the lessor of possession and control and places it in the lessee to the exclusion of the

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lessor. The lease contemplated is an effective instrument possessing all of the qualities and incidents with which a lease is invested at common law between landlord and tenant. So much has been conclusively determined by both this court and the Supreme Court in *Moorshead v. United Rys. Co.*, 119 Mo. App. 541, 96 S. W. 261; *Moorshead v. United Rys. Co.*, 203 Mo. 121, 100 S. W. 611. See Elliott on Railroads, sec. 469. It is certain that at common law if the landlord executed a lease to a tenant and delivered the possession of the property demised in a sound state of repair, he performed the full measure of his obligation and was not responsible for injuries to third persons which thereafter accrued through the negligence of the lessee, either in the management of the premises or in permitting them to become out of repair. [Taylor on Landlord and Tenant (9 Ed.), sec. 175.] Indeed, not only is there no obligation on the part of the lessor at common law to repair the leased premises while in the possession of the lessee unless assumed by a covenant to that effect, but on the contrary the lessor is not permitted to enter the premises for the purpose of repair except by reservation of authority to do so. The common law has always thrown the burden of repairs upon the lessee as being in fact a bailee of the premises and bound to restore the same as he received them. [Taylor on Landlord and Tenant, secs. 174, 175, 327, 328; *Ward v. Pagin*, 101 Mo. 689, 14 S. W. 788; *Gordon v. Peltzer*, 56 Mo. App. 599; *Herdt v. Koenig*, 137 Mo. App. 589, 119 S. W. 56.] The doctrine mentioned obtains with full force as between one railroad company as lessor and another as lessee when the lease is expressly authorized by the statute and unincumbered with reservations or statutory duty imposed to the contrary. [Moorshead v. United Rys. Co., 119 Mo. App. 541, 96 S. W. 261; *Moorshead v. United Rys. Co.*, 203 Mo. 121, 100 S. W. 611; *Caruthers v. Kansas City, etc., R. R. Co.*, 44 L. R. A. 737 and instructive note.] It is true the *Moorshead* case presented a

question of the liability of the lessor company for the tort of the lessee committed through its agent in operating the car. However that may be, there is no distinction in principle between the question in judgment there and the one presented here, for while the plaintiff's injury in this case resulted from the defective roadbed of the lessor, the defect was one which the law cast the duty upon the lessee to mend. It is suggested that as the defect complained of existed in the track of the lessor, that company is liable to respond as well for the plaintiff's hurt, because the law annexes to its franchise the duty to exercise care in respect of its roadbed, and there can be no doubt that such is its obligation at common law. But the suggestion omits entirely to reckon with the fact that the competent legislative authority has authorized it to farm out its tracks to another and thus assume a relation to the property which as a matter of law precludes its right to either enter upon or repair the same while in possession of the lessee. The argument would inhere with much force if it appeared that the defect was one which existed in the track at the time the lease was executed and the possession given over to the lessee, for in such circumstances, the law would view it as a nuisance and treat it accordingly to the end that both the lessor, who had created the nuisance, and the lessee, who had continued the same, should respond for its baneful effect upon an innocent third party. [Taylor on Landlord and Tenant (9 Ed.), sec. 175; Gordon v. Peltzer, 56 Mo. App. 599; Tate v. M. K. & T. R. R. Co., 64 Mo. 149, 155; Mancuso v. Kansas City, 74 Mo. App. 138.] And so it is if the lessor's tracks were defective in the manner disclosed by the evidence as a result of negligent construction, at the time the lease was executed, and continued in that condition through the default of the lessee, liability would not only attach to the lessee company but continue as well against the lessor for such negligent construction on the principle of nuisance referred

to. The following authorities are in point: *Arrowsmith v. Nashville & D. R. R. Co.*, 57 Fed. 165; *Nugent v. Boston, etc., R. R. Co.*, 80 Me. 62; see, also, *St. Louis, etc., R. R. Co. v. Curl*, 28 Kan. 633; *Miller v. N. Y., etc., R. R. Co.*, 125 N. Y. 118; *Moorshead v. United Rys. Co.*, 119 Mo. App. 541, 96 S. W. 261; *Moorshead v. United Rys. Co.*, 203 Mo. 121, 100 S. W. 611; *Elliott on Railroads* (2 Ed.), sec. 469.

There is naught in the case tending to show that the lessor company covenanted to repair the tracks. It appears its roadbed and track were sound and secure at the time the lease was executed and that the lessee had been operating under the lease for a considerable period. The lessee company had undertaken to repair the defective track at the place mentioned only about three days before the plaintiff received his injuries but performed the work in such a careless manner the embankment gave way a second time and resulted in the derailment of the car in which plaintiff was riding. Under these circumstances, it appears conclusively that no liability may be asserted against the lessor for the negligence of the lessee in failing to perform its duty in the premises. The relation of lessor and lessee not only affixed the obligation upon the lessee to exercise care in maintaining the tracks but precluded the lessor as well from any right to enter upon the premises for the purposes of repair.

The judgment will be reversed as to the Cape Girardeau & Chester R. R. Co., the lessor, and that defendant discharged. As to the defendant, The Chester, Perryville & Ste. Genevieve Ry. Co., the lessee, the judgment will be reversed and the cause remanded. It is so ordered. All concur.

FRANK SIMMONS, Assignee, etc., Respondent, v. WESTLAKE CONSTRUCTION COMPANY, Appellant.

St. Louis Court of Appeals, March 2, 1910.

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS:** Building Contract; Assignee not Required to Perform. An assignee for the benefit of creditors is not bound to complete a construction contract made by the assignor before insolvency, though the assigned estate is liable for the breach thereof.
2. **CONTRACTS:** Construction. English words must be given their usual meaning in construing unambiguous contracts.
3. **Building Contract: Contract Price: Construction: Facts Stated:** Plaintiff assignor, for the benefit of creditors, had agreed with the principal contractor to furnish certain materials and do certain work on a building for the sum of \$1500, and after his assignment to plaintiff, when the contract had been partially completed, the latter executed a contract with the principal contractor and others, by which he agreed to complete the contract by February 9, 1908 (the original contract requiring its completion by December 10, 1907), and the principal contractor agreed to waive its right to liquidated damages provided in the original contract for failure to complete the work when agreed, and to assist plaintiff to procure power to operate the assignee's machine so as to facilitate the work. The contract also provided that the principal contractor should pay plaintiff for all labor and materials required to complete the work in weekly payments, and required plaintiff to submit to it a detailed pay roll for all labor and invoices for all materials, for which he desired to be paid, and also provided that, when the principal contractor shall have paid for all labor and material so required by plaintiff, the balance due under the contract should be paid to another party thereto. *Held*, that the principal contractor was required to pay plaintiff for all the labor and material required to complete the work, whether or not the amount paid therefor exceeded the \$1500 stipulated in the original contract.

Appeal from St. Louis City Circuit Court.—*Hon. Virgil Rule, Judge.*

AFFIRMED: _____ (Charles H. Brown and H. Edward M. Brown)

**Thomas C. Hennings and Klein & Hough for ap-
pellant.**

(1) An agreed case must be verified by affidavit. R. S. 1899, sec. 793; (2) A contract must be construed as an entirety. County of Johnson v. Wood, 84 Mo. 489; Lewis v. Pean, 3 Mo. App. 372; Construction Co. v. Hayes, 191 Mo. 292. (3) Recital of a prior agreement, in a later one, after it has been executed, does not extinguish the former. Johnson v. Wood, 84 Mo. 597; Bank v. Patterson's Admr., 11 U. S. 299; Noel v. Gaines, 68 Mo. 658; Bruce Admr. v. Beak, 48 Mo. 286; Menne v. Neumeister, 25 Mo. App. 305. (4) Circumstances surrounding the execution of a contract and a supplementary one may be looked to, to ascertain the intention of the parties, or, as the Westlake Construction Company could have compelled the surety on Ellinger's bond to finish the contract for the contract price of \$1500, there was no inducement for it to enter into the modified agreement unless it expected work to be done for that price. The surrounding circumstances must be looked to to ascertain intention of parties. Koehring v. Maminghoff, 61 Mo. 403; Pratt v. Langston, 111 Mo. App. 102; Knoepker v. Redel, 116 Mo. App. 67; Nordyke v. Marmon, 155 Mo. 643. (5) A contract modified, amid circumstances which imply or warrant the belief that no additional expense will result from the change, will not warrant a construction that the contracting party intended to add to the amount of the original consideration. Boody v. Rutland, 3 Blatch. 25, Fed. Cases, No. 1635; Wear Bros. v. Schnelzer, 92 Mo. App. 314; Gibbons v. United States, 15 Ct. Claims 193; Gallagher v. Dist. of Columbia, 19 Ct. Claims 564.

Charles M. Reeves and William H. Davies for respondent.

(1) What is clear needs no interpretation, and oral testimony is inadmissible to contradict or vary the terms of a written contract. 1 Greenleaf on Ev., sec. 275; 7 Am. and Eng. Ency. Law (1 Ed.), 91. (2) A person signing a contract is conclusively presumed to know its contents and to accept the same, and all prior negotiations are merged in the writing. *Leicher v. Keeney*, 98 Mo. App. 394; *Crim v. Crim*, 162 Mo. 544. (3) A party may change or modify the terms of a written contract by a subsequent agreement, and when this is done he must declare on the agreement as modified. *Lanitz v. King*, 93 Mo. 513; *Munroe v. Perkins*, 9 Pickering. 298; *Lattimore v. Harson*, 14 Johnson 330; 1 Greenleaf on Ev., sec. 303. (4) In the absence of fraud or mistake, a complete written contract is a merger of all antecedent agreements between the parties and affords conclusive evidence of the knowledge and assent on the part of the parties to all its contents terms and conditions. *Huber Mfg. Co. v. Hunter*, 87 Mo. App. 50; *Bishop on Contracts*, sec. 319.

NORTONI, J.—This is a suit on a contract. The breach alleged relates to the defendant's refusal to pay for certain materials and labor furnished under the contract. The plaintiff recovered and defendant appeals.

The facts were all agreed to by the parties. The trial was had before the court without a jury. There was no verbal testimony introduced and no instructions asked or given. The only question therefore worthy of consideration relates to the construction of the modified contract presented in the agreed statement of the case. The facts stipulated between the parties are as follows:

"I. That the said Frank Simmons is the regular appointed assignee of W. D. Ellinger.

"II. That said W. D. Ellinger entered into a contract with the Westlake Construction Company, dated the eleventh day of October, 1907, in which he agreed to furnish and install all of the mill work, cabinet work, office partitions, rails, enclosures, window frames, sash, door frames, doors, wainscoting, shelves, drawers, butts, locks, drawer pulls, setting, finishing and painting of same, complete in the building mentioned in said contract; also all glass and glazing except Novus glass, being everything called for in specifications covering the work required to complete the additions and alterations to the Mechanics-American National Bank building as called for in the specifications and plans for this work made by A. B. Groves, Architect, the specifications being attached to said contract.

"III. That on the sixth day of January, 1908, the parties, plaintiff and defendant, entered into the modified agreement as per exhibit attached and herein set out (of which the following is a verbatim copy, with the exception of the first paragraph thereof, which simply names Westlake Construction Company as party of the first part; Frank Simmons, assignee of W. D. Ellinger, as party of the second part; Lafayette National Bank as party of the third part, and the American Bonding Company as party of the fourth part):

"1. The work mentioned and described in said contract shall be taken up and fully completed by the said Simmons, party of the second part. Said Simmons shall begin the work of installation not later than the ninth day of January, 1908, and it shall be completed and fully performed within thirty secular or working days thereafter, provided he is not delayed by said party of the first part.

"2. Said party of the first part shall pay the said party of the second part, or on his order, for all labor and for all materials required to complete the work described in the foregoing contract, and shall make such payments weekly, on Saturday of each week. Said party of the second part shall submit to said party of the first part a detailed pay roll for all labor and invoices or vouchers for all materials, for which he desires to be paid.

"3. Said party of the first part undertakes to assist the said party of the second part in obtaining from the Union Electric Light & Power Company, or the Laclede Power Company, the necessary motive power for operating the machinery in the factory of said W. D. Ellinger, of whom said party of the second part is assignee, so far as such power is necessary for the performance of the work described in the foregoing contract.

"4. When said party of the first part shall have paid for all materials and all labor so required by said party of the second part, then it shall pay the entire balance due under the foregoing contract to the Lafayette Bank, party of the third part hereto.

"5. All of the foregoing terms being complied with, the party of the first part waives any right to demand liquidated damages under the terms of the foregoing contract.

"IV. It is further agreed by the parties hereto that the said Frank Simmons, as assignee, as plaintiff herein, has expended on said contract the sum of two thousand one hundred fifty-seven dollars and thirty-seven cents (\$2,157.37), and that the said Westlake Construction Company, under clause two of said modified agreement, has admitted that it is indebted to said assignee in the sum of fifteen hundred dollars (\$1500), and that it has paid to said plaintiff, on account of same, the sum of fourteen hundred seventy-one dollars

and thirty cents (\$1471.30), leaving a balance due said plaintiff of twenty-eight dollars and seventy cents (\$28.70), which balance said defendant has tendered to plaintiff, and which tender said plaintiff herein admits, but the said defendant refused and still refuses to pay to said plaintiff the sum of six hundred eighty-six dollars and seven cents (\$686.07), the balance which said plaintiff still claims is due under said contract, and which the defendant herein denies, and upon the foregoing facts the case is submitted to the court, sitting as a jury, upon the issues joined herein, with leave to either party to except to any rulings of the court on propositions of law that may be moved by either as applicable to the case and take a bill of exceptions in respect thereof." (The italics are our own.)

From other of the facts stipulated, it appears that W. D. Ellinger had taken the contract to furnish the material and labor and installed the work mentioned for the Westlake Construction Company in the Mechanics-American National Bank Building then being constructed by the Westlake Construction Company who was the general contractor. Under the original contract referred to, Ellinger had agreed to complete the work by the 10th day of December, 1907, and if not completed by that date, to pay ten dollars per day as liquidated damages for each day he was in arrear thereafter. Upon completion of the work, Ellinger was to receive fifteen hundred dollars as total compensation therefor. During the time the work was progressing, he was entitled, under the original contract, to receive payments monthly thereon from the general contractor, the Westlake Construction Company; however, that company retained the right to withhold at all times fifteen per cent of the amounts due Ellinger. Ellinger had executed a bond in the sum of seven hundred and fifty dollars for the faithful execution of his contract and the American Bonding Company was his surety thereon.

After the work had been partially completed, it seems Ellinger became insolvent and executed an assignment for the benefit of creditors under our statutes. The present plaintiff, Mr. Simmons, is his assignee under that assignment. This is the condition which obtained when the parties executed the modified contract now in judgment. It appears from the modified agreement that Simmons, Ellinger's assignee, agreed to take up the work and complete it on or before the 9th day of February, 1908, whereas under the original contract it should have been completed by the 10th day of December, 1907.

It appears, too, from a careful reading of the modified contract that the Westlake Construction Company was willing to make concessions to the end that this work should be completed. This is natural enough, indeed, for it appears that company was the general contractor for the building and was no doubt required to hasten its completion. The Westlake Construction Company stipulated in the modified contract, among other things, to waive all right to demand liquidated damages under the terms of the original contract with Ellinger. The liquidated damages referred to were stipulated at the rate of ten dollars per day for default in event Ellinger failed to complete the work on December 10th, 1907. It also appears that the Westlake Construction Company, as a further concession to induce Mr. Simmons, the assignee, to complete the contract, was willing to and did obligate itself to use its best offices to assist him in obtaining from the Union Electric Light & Power Company or the Laclede Power Company the necessary motive power for operating the machinery in the factory of Ellinger, to the end that the work contemplated might be pushed forward. These matters are referred to as elucidating an expressed intention on the part of the Westlake Construction Company to make concessions in order that the works mentioned in the contract might be pushed forward. The modified

contract revealing the Westlake Construction Company in this attitude at the time of its execution elucidates to some extent the stipulation with respect to the agreement on its part to pay for all labor and materials used in installing the work.

Now, it is true while the original contract stipulated fifteen hundred dollars as the full compensation which Ellinger was to receive for material and work, nothing whatever is said in the modified contract indicating that that amount should control between the present parties. The modified contract was entered into by different parties, for the law imposed no obligation on the assignee to complete the work although the assigned estate in his hands was liable for the breach of the original contract. The modified contract stipulates in section II thereof that the party of the first part, who is the Westlake Construction Company, shall pay the party of the second part, Mr. Simmons, the plaintiff, or his order, *for all labor and for all materials* required to complete the work described in the foregoing contract and shall make such payments weekly on Saturday of each week. It appears from the same stipulation that Mr. Simmons, the plaintiff, was required to submit to the Westlake Construction Company a detailed pay roll for all labor and invoices or vouchers for all materials for which he desired to be paid. Why was the plaintiff required to submit such detailed statements for all labor and all materials unless the defendant construction company expected to pay for the same? It seems that if the parties had intended that the work should be completed for fifteen hundred dollars as total compensation, some reference would have been made thereto in the modified contract, as the chief and principal modification of the original contract consists in stipulating about the matter of payments. We are required, in interpreting unambiguous contracts, to accord English words their usual and ordinary meaning. When we do this, we see no

escape from the conclusion that the agreement expressed on the part of the Westlake Construction Company to pay for all labor and for all materials required to complete the work means all labor and all materials used therein notwithstanding the fact that the former contract had fixed the total sum at fifteen hundred dollars.

Section IV of the modified contract seems to contemplate that there might be a profit earned in completing the work and stipulates that when the Westlake Construction Company had paid for all materials and all labor required, then it should pay any balance due under the contract to the Lafayette Bank. This also tends to show that, while the Westlake Construction Company was in a humor to make concessions in order that the work might be speedily completed, it again expressed an agreement to pay for all materials and all labor required.

We believe the contract was properly interpreted at the trial and that the judgment should be affirmed. It is so ordered. *Goode, J.*, concurs; *Reynolds, P. J.*, dissents.

FRANK A. ROZIER, Etc., Respondent, v. ST. LOUIS
& SAN FRANCISCO RAILROAD COMPANY,
Appellant.

St. Louis Court of Appeals, March 8, 1910.

1. **CONTRACTS: Sale of Material: Certainty of Terms.** An agreement, by which a quarry company agreed to furnish the other contracting party all the dirt and stone it could take out of a quarry, the price of the stone being fixed, was sufficiently definite, although no price was agreed upon for the dirt, the parties by their subsequent conduct fixing that price, and was sufficiently definite as to the quantity of material to be taken also, the quantity being all the rock the quarry company could take out of the quarry during the period of the contract.

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2. ———: ———: **Mutuality.** At the time said contract was made, both parties knew what quantity of material would be taken out, and the quarry company became bound by its agreement to turn out what material it could by reasonable diligence and the other party became bound to take the output, and hence the contract was not lacking in mutuality.
3. ———: **Mutuality: Performance.** A contract lacking mutuality may become binding by performance.
4. ———: **Sale of Material: Construction.** Where a railroad company, through its superintendent, agreed with a quarry company to take all the material the latter company could get out during a specified period, it was bound to take such material, even though its superintendent mentioned he would divide the available funds between the quarry company and another quarryman.
5. ———: ———: **Action for Breach: Instructions: Allowing Recovery Outside Scope of Contract.** A quarry company and a railroad company entered into a contract by which the latter agreed to take all the rock excavated from a quarry. After taking the rock as well as the dirt which had been excavated, for some time, the latter company refused to longer do so. In an action for breach of the contract, an instruction which permitted a recovery for the profits the jury believed plaintiff would have made on dirt was erroneous; and the error was not harmless, although plaintiff disclaimed in evidence any intention of making claim for future profits which might have been earned on dirt, there being evidence that though the quarry was pretty well stripped some dirt remained.

Appeal from Ste. Genevieve Circuit Court.—*Hon. Chas. A. Killian*, Judge.

REVERSED AND REMANDED.

W. F. Evans and *Moses Whybark* for appellant.

(1) It is alleged in the petition that the receiver was authorized by the order of the court appointing him to operate the quarry. This was denied in the answer and no proof was offered by the plaintiff to support this averment in the petition. This was a material allegation necessary to be alleged, and therefore must be proved. *Scott v. Robards*, 67 Mo. 289; *Pier v. Heinrich*—

offen, 52 Mo. 333. (2) The quarry company was incorporated as a manufacturing and business company under article 9 of chapter 12 of the Revised Statutes of 1899, and the receiver therefore was appointed under sections 1338, 1339 and 1340 of that statute. The court therefore erred in overruling defendant's objection to the order of the court authorizing the receiver to sell the property and consult counsel, for the reason that that order conferred no authority upon the receiver to bring this suit, and it was brought without an order of the court authorizing him to bring it, and the objection should have been sustained. The court had no power to delegate the authority as was done in this case. R. S. 1899, sec. 1339; Cox v. Volkert, 86 Mo. 505; Thompson v. Greeley, 107 Mo. 577. (3) Instruction number 1, given on behalf of the plaintiff, submitted the question of both dirt and rock to the jury and authorized them to assess damages on account of the dirt as well as the rock under the contract, when the plaintiff himself testified that he had no particular contract about the dirt. McQuillin on Instructions to Juries in Missouri, sec. 95, p. 67. (4) There was no mutuality in the contract, and it was void. There never was a time when Rozier was under any legal obligation to furnish the defendant with a pebble-stone, or a spadeful of dirt, according to the strongest construction that can be given to the plaintiff's evidence. Unless both parties are bound by a contract, so that an action may be maintained by either against the other for a breach neither is bound. Campbell v. American Handle Co., 117 Mo. App. 19; Publishing & Eng. Co. v. Walker, 87 Mo. App. 508; Jones v. Durgin, 16 Mo. App. 370; Mers v. Insurance Co., 68 Mo. 127. (5) The proof of the contract adduced by plaintiff shows an agreement so uncertain and ambiguous that the intention of the parties can not be ascertained; there is nothing definite about it, and no obligation assumed so far as plaintiff is concerned. "To constitute an enforceable contract it

must be founded on a valuable consideration, and be definite in its terms." *Wesson v. Horner*, 25 Mo. 81; *Burks v. Stam*, 65 Mo. App. 455; 9 Cyc. 248-9; *Crane v. C. Crane & Co.*, 45 C. C. A. 96; *Cotton Oil Co. v. Kirk*, 68 Fed. 791; *Trans. Co. v. Bolt & Nut Co.*, 52 C. C. A. 25. The construction placed on the contract by the plaintiff is not permissible to prove its meaning. *Dakan v. Ins. Co.*, 125 Mo. App. 451. (6) The acceptance of dirt and rock by the defendant from plaintiff, and payment therefor, did not validate the agreement; such accepted orders constituted nothing but sales at the prices named in the contract. *Trans. Co. v. Bolt & Nut Co.*, 52 C. C. A. 25. (7) The evidence shows without contradiction that plaintiff dealt with the superintendent of defendant, Mr. Elliott, as such; that he was advised that Mr. Elliott was only authorized to expend \$30,000, and would have to divide that amount with another quarry, and never agreed to expend any certain amount of this sum with him, but at most that he thought he could give him a majority, as Tlappek expresses it, of the amount he was authorized to expend. The testimony of plaintiff further shows that he received about \$11,000 for stone and dirt. The instructions given for plaintiff wholly disregard this feature of the contract, and authorizes the jury to award plaintiff any amount of damages he may have sustained, irrespective of the amount Mr. Elliott could expend. The instructions were not warranted by the evidence. *McQuillan on Instructions to Juries in Missouri*, p. 67, sec. 95; *Reynolds v. Railroad*, 114 Mo. App. 675; *Sweet, Demster & Co. v. Sullivan*, 77 Mo. App. 134.

T. B. Whitledge and John V. Noell for respondent.

(1) If defendant entered into a contract with Mr. Rozier as receiver, it is estopped from denying his authority. In other words, it is not within the power of defendant after having received the benefit of the

contract and acted upon the same, to escape liability by repudiating the contract. 7 Am. and Eng. Law (1 Ed.), p. 29; Bigelow on Estop. (5 Ed.), 687; Greely v. Bank, 103 Mo. 212. (2) The verdict of the jury is conclusive as to weight of evidence and the appellant court will not disturb a verdict after a refusal to grant a new trial in the court below, on the ground that the evidence does not support the verdict except in cases where gross wrong has been done or the verdict is the result of passion, bias or prejudice. State v. Adams, 19 Mo. 246; Price v. Evans, 49 Mo. 396; Fletcher v. Drath, 66 Mo. 126; Chongnett v. Railroad, 152 Mo. 257; Lee v. Knapp, 137 Mo. 385; Mattoon v. Railroad, 49 Mo. App. 627; Rea v. Furguson, 72 Mo. 225. (3) In answer to point 3 of appellant's brief, respondent says that Frank A. Rozier testified that while the price of the dirt was not specifically agreed upon at the time of the contract made by him with Mr. J. H. Elliott, yet that Mr. Elliott on behalf of defendant agreed to take the dirt as well as the rock. But, the plaintiff at the trial made no claim of damages on account of defendant's refusal to take dirt, and introduced no evidence tending to show such refusal. Hence, the instruction number 1 given on behalf of plaintiff merely contained a clerical inaccuracy in referring to the dirt, and such clerical mistake was under the circumstances a harmless error which would not warrant a reversal of this case. R. S. 1899, sec. 1672. (4) The contract was not void for want of mutuality. Type-writer Co. v. Realty Co., 220 Mo. 525; Transportation Co. v. Bolt Co., 114 Fed. 771; Locomotive Co. v. Steel Casting Co., 155 Fed. 77; 3 Am. and Eng. Ency. Law (1 Ed.), p. 846; Botkin v. McIntyre, 81 Mo. 557; Publishing Co. v. Walker, 87 Mo. App. 508; Laclede Constr. Co. v. Iron Works, 169 Mo. 151; Levi v. Ins. Co., 61 Mo. 238; Glover v. Henderson, 120 Mo. 367.

GOODE, J.—This plaintiff is receiver of the Ste. Genevieve Quarry & Construction Company, having been appointed and duly qualified during the October term, 1906, of the circuit court of Ste. Genevieve county. Late in February, 1907, he entered into a contract with defendant to furnish and deliver to it all the dirt and stone he could take out of the quarry of the company of which he was receiver, from and after the date of the contract until December 31, 1907. The petition alleges the railroad company agreed to pay plaintiff twelve cents a cubic yard for the dirt and sixty cents a cubic yard for the stone, but plaintiff himself testified there was no specific agreement about the price of the dirt, as what the railroad company wanted was the rock and it agreed to take the dirt in order to get the rock. Plaintiff testified he told J. H. Elliott, superintendent of the railroad company, plaintiff could take out from ten to fifteen cars of material a day and, too, that each carload would average about thirty cubic yards of material. Elliott said the roadmaster, Kelly, would arrange about the price of dirt. Plaintiff stated to Elliott as follows: He (plaintiff) did not desire to go to the expense of opening the quarry and buying machinery for it unless there was a certainty of the company taking the output. A lease on the quarry until December 31, 1907, was the only asset of the Ste. Genevieve Quarry & Construction Company. It would take a great deal of money to prepare to get out the material and plaintiff would have to advance it. Elliott told him not to be uneasy, for the company would take all the rock and dirt plaintiff could get out. A witness who was present during the conversation testified substantially as plaintiff, only he said nothing about the agreement between plaintiff and Elliott referring to dirt, as well as stone; that plaintiff said he wanted the railroad company to take the rock which would be quarried and furnish cars for it. This witness' testimony will be shown best by this excerpt: "Mr. Rozier says, 'I cannot go ahead with

this unless I have the assurance you will take this rock,' and Mr. Elliott says, 'Sure, we need the rock and I will take it,' " further saying the company had about \$30,000 to spend for such material, but he would have to divide the amount with another quarry, but would give plaintiff the major part of it; Elliott said: "I am satisfied I can give you a majority; I will take all you can get out." Elliott denied making the contract as testified, and the substance of his version was he only agreed to take such quantity of stone as he wished. Plaintiff equipped the quarry, began to operate it early in March, and from then on until the latter part of September, furnished material consisting of dirt and stone to the company, and it accepted the material as it was taken from the quarry to the amount of \$11,000. Elliott then notified plaintiff the company would take no more, and as plaintiff said, gave him "about fifteen minutes to quit work" just when the dirt had been stripped from the quarry and plaintiff had got down to the rock and was ready to work it. Plaintiff said he did not "intend to fool with dirt" from that on, did not need to handle any more dirt; further saying his claim in this case was for rock and not for dirt. He estimated the cost of getting the rock out was forty cents a cubic yard, which would net him a profit of twenty cents. The purpose of this action is to recover the profit which would have been earned by performing the contract from the time defendant refused to take any more material to the date of the expiration of the contract on December 31st.

In the instructions granted for plaintiff, the jury were authorized to return a verdict in his favor if they found defendant had agreed to take and pay for all the rock and dirt taken out within the period mentioned, furnished and delivered to defendant from the quarry of the Ste. Genevieve Quarry & Construction Company at an agreed price per cubic yard, and further found defendant refused, before the expiration of the time, to take rock and dirt, and by reason of this refusal to

take and pay for rock and dirt, plaintiff had sustained damage. The other instructions also proceeded on the theory that the contract was for both rock and dirt.

The jury returned a verdict for plaintiff, assessing his damages at \$3500 and judgment having been entered for that sum, defendant appealed.

Defendant's counsel strike at the foundation of the judgment, contending the alleged agreement declared on lacked mutuality and was too indefinite to constitute a valid contract, for which reasons it is non-enforceable. The supposed want of certainty consists of failure to state what quantity of material was to be furnished and taken and the price of the dirt. We regard the agreement as sufficiently certain to be a valid contract. The term during which material was to be supplied was fixed and ran from the date of the agreement in February to the expiration, December 31, 1907, of the leasehold plaintiff held. The price of rock was fixed at sixty cents a cubic yard, and though no price was agreed on at first for the dirt, the parties by their conduct fixed that price at twelve cents a cubic yard. The quantity to be furnished and accepted was all the material, or, in any event, all the rock plaintiff could take out of the quarry during the period mentioned; possibly subject to the exhaustion of the money available for the purchase of such material. Moreover plaintiff estimated with Elliott the output of the quarry, fixing it at twenty to twenty-five carloads a day of thirty cubic yards each. The other element said to be lacking and needed to give the agreement enforceable certainty and also to give it mutuality of obligation, was a stipulation by plaintiff binding himself to supply a minimum quantity of material. It is argued he was not bound to furnish any; not "a pebble-stone or a spade full of dirt." counsel for defendant say. This argument, the facts considered, is more specious than sound. Elliott, as superintendent of defendant company, had been taking material from that quarry before the Quarry Company

passed into the hands of a receiver and was well aware of its average output. In fact what the receiver was trying to do after he took charge, was to get a renewal of the arrangement, which had been previously carried out between defendant and the Quarry Company. At the time the contract was formed, both parties knew what quantity of material would be taken out and plaintiff became bound by his agreement to turn out what he could by reasonable diligence and defendant bound to take the output. [Excelsior Wrapping Co. v. Messinger (Wisc.), 93 N. W. 459.] Moreover, when plaintiff was notified in September defendant would take no more material, the quarry had been worked by plaintiff and deliveries from it made to defendant for more than six months, and its capacity thereby demonstrated, a fact which likens this case to Louisville, etc., R. R. v. Coyle, 8 L. R. A. (n. s.) 433, wherein it was held a contract which might have lacked mutuality at first became binding by performance. That case is very like this, as is also Herrick v. Wardwell, 58 Ohio St. 299, which was decided on the same principle. There is not present here the fact of either plaintiff or defendant having the right or option to make the quantity of material furnished or accepted as small as might be wished, down to nothing. It is rather the instance of two parties who are perfectly familiar with the capacity of a business, agreeing with each other and one undertaking to furnish the product up to capacity, and the other to take and pay for it, which agreement had been largely carried out before one party elected to stop performance. We think by the weight of modern authority such an understanding is a valid and effective contract, and cite as relevant though not so much in point as the two cases last cited, the following: National, etc., Co. v. National, etc., Co., 155 Fed. 77, 11 L. R. A. (n. s.) 713; Loudenbeck v. Phosphate Co., 121 Fed. 298; Wells v. Alexander (N. Y.), 15 L. R. A. 218; Cold Blast, etc., Co. v. Bolton Nut Co., 57 L. R. A. 692; Lumber Co. v. White

Breast Coal Co., 160 Ill. 85; Great Northern R. R. Co. v. Withan, L. R. 9 C. P. 16. The case in hand is to be distinguished from Campbell v. Am. Handle Co., 117 Mo. App. 19, 94 S. W. 815, where there was no agreement to sell the whole yield of the factory, but simply to sell and deliver to the defendant timbers of certain length without in any way designating the quantity.

Just what the terms of the contract entered into by the parties were must be determined by the triers of the fact, and it is material to determine them accurately. If Elliott's testimony is true, he only bound himself to take material at his pleasure, with the right to cease taking it when he wished. If this was the agreement, there can be no recovery of damages, for defendant might stop taking at any time. The evidence for plaintiff presented the possibility of the agreement having been made in either of two forms of different consequences. It might be inferred from the testimony of some of the witnesses for plaintiff, that though Elliott agreed to take what rock could be quarried during the stipulated period, he qualified his agreement with the proviso he would only take from plaintiff material to the amount of the major part of \$30,000 which he had on hand to expend for dirt and rock. If this was the understanding, inasmuch as Elliott actually took \$11,000 of material and paid for it, he was only bound thereafter to take a quantity, the price of which would exceed \$4000 by any sum. If, however, as other testimony went to prove, he agreed to take all the material plaintiff could get out during the period, he was bound to do so even though he mentioned he would divide the available funds in his hands between plaintiff and another quarryman.

All the instructions for plaintiff proceeded on the theory defendant was obligated by the contract to take all the dirt and rock taken out of the quarry by plaintiff, though the latter testified he made no claim for future profits which might have been earned on dirt. We are

asked to hold this was harmless error because plaintiff testified he had the rock stripped of dirt and thereafter would have tendered only rock. The testimony was not uniform to that effect. Some of plaintiff's witnesses gave testimony which looked the other way. One of them said when work was stopped in September, the quarry was in pretty good shape to get out stone as a great deal of the bluff had been cleared up; that they did not get out all the dirt before the quarry stopped, but the quarry was in pretty good shape. Another witness testified a great deal of dirt had been stripped off and there would have been little to handle when the quarry was closed down. In view of such testimony we are unwilling to hold defendant could not have been prejudiced by authorizing the jury to assess damages "for the net profit which he (plaintiff) lost by reason of defendant's refusal to accept and pay for dirt and stone in compliance with his contract." The court further instructed "net profit" meant the difference between the contract price "of said stone and dirt and the cost of quarrying and delivering the same on board defendant's cars." The verdict was for a considerable sum, and we are unwilling to say in the face of the instructions, the jury allowed nothing as damages for the profit they believed plaintiff would have made on dirt after September, but assessed damages only for the profit he would have earned on rock.

The judgment is reversed and the cause remanded. All concur.

LONA BRANNOCK, Respondent, v. ST. LOUIS &
SAN FRANCISCO RAILROAD COMPANY, Ap-
pellant.

St. Louis Court of Appeals, March 8, 1910.

1. **MASTER AND SERVANT: Railroads: Negligence: Injury to Servant: Manner of Injury: Question for Jury.** In an action against a railroad company for the death of a switchman, the question whether his injury was caused by catching his foot between the main rail and the guardrail, *held*, under the evidence, for the jury.
2. ———: ———: ———: **Failure to Block Rails: Statute.** The failure of a railroad company to block its guardrails, as provided by sections 1123, 1125, incl., Revised Statutes 1899, is negligent conduct.
3. ———: **Negligence: Assumption of Risk: Master's Negligence.** An employee does not assume risks incident to the negligence of his employer and does not assume the risk of working about a device, which the master has not safeguarded as required by statute, even though the employee is aware of its condition.
4. ———: **Railroads: Negligence: Injury to Servant: Going Between Moving Cars: Speed of Cars.** An employee of a railroad who goes between moving cars to couple or uncouple them is not necessarily guilty of negligence as a court matter, but whether such an act is or is not negligence depends on its coincidents, especially the speed of the cars; and probably there would be no legal conclusion of negligence if the speed was not more than four to six miles per hour.
5. ———: ———: ———: ———: ———: **Safety Device Furnished.** Where a device has been provided to enable railroad cars to be cut or coupled without taking the risk of entering between them and a rule forbids the latter method, an employee who resorts to the more dangerous method, instead of the safer one, will be denied a recovery; but if a condition arises that prevents the use of the safer method and the employee goes between the cars, the propriety of the act will be determined according to the principle which would apply if no safety device had been furnished.

6. **EVIDENCE: Presumptions: Exist Only in Absence of Evidence.** Where there is evidence on an issue of fact, the truth is to be found from the evidence, and not presumed, as in the absence of evidence.
7. ———: **Conclusiveness: Trial Practice.** Testimony in the nature of an opinion on the issue to be tried, rather than the statement of a fact, is not conclusive on the party producing it, especially if there is countervailing evidence or for any reason the jury might believe the contrary.
8. **MASTER AND SERVANT: Railroads: Negligence: Injury to Servant: Going Between Moving Cars: Sufficiency of Evidence.** In an action for the death of a railroad switchman caused by his going between moving cars to uncouple them, testimony that deceased held up the lever provided for uncoupling the cars while walking seven or eight feet to keep up with the cars, which were moving from four to six miles per hour, was not substantial proof of reasonable effort to manipulate the lever or such as a careful employee would have been satisfied with before taking the risk of entering between the cars. But evidence that deceased walked by the cars for twenty yards with his hand on the lever, and that he may have been endeavoring over said distance to cut the cars by the lever, it appearing he was intent on the purpose to cut them from his grasping the handhold with one hand and the coupling pin with the other, after going between them, was sufficient proof of reasonable effort to cut them from the outside before facing the hazard of going between them.
9. ———: ———: ———: ———: ———: **Contributory Negligence: Jury Question.** In an action for the death of a switchman by being run over while between cars in the act of uncoupling them, the question of his negligence in going between the cars *held*, under the evidence, for the jury.
10. ———: ———: ———: ———: ———: **Unblocked Rails: Proximate Cause.** In an action for the death of a railroad switchman, who, while between moving cars endeavoring to uncouple them, slipped and caught his foot in an unblocked guardrail, causing injuries from which he died, if the jury found he was negligent in going between the cars, such conduct would be a concurrent cause with defendant's.
11. **NEGLIGENCE: Knowledge of Danger: Proximate Cause.** Ability to anticipate by ordinary forethought that harm is likely to result from the wrongful conduct of another if one does a given careless act, is material on the question of whether said act is superseded as the proximate cause of the ensuing harm, and if the act of carelessness is performed knowing, or with

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good reason to know, it exposes the actor to injury from another's tort and injury follows, the first carelessness remains a concurrent and proximate cause.

12. **MASTER AND SERVANT: Railroads: Negligence: Injury to Servant: Instructions: Failure to Submit Contributory Negligence.** In an action for the death of a railroad switchman caused by his going between moving cars to uncouple them, the main instruction for plaintiff was erroneous in omitting from consideration the defense of contributory negligence of deceased in going between the moving cars.

Appeal from Stoddard Circuit Court.—*Hon. Jas. L. Fort*, Judge.

REVERSED AND REMANDED.

W. F. Evans, W. J. Orr and S. L. Clark for appellant.

(1) The failure to block the frogs and guardrails in appellant's railroad yards, was not the proximate cause of the injuries to respondent's husband. *Stepp v. Railroad*, 85 Mo. 229; *Mathiason v. Mayer*, 90 Mo. 585; *Kennedy v. Railroad*, 70 Mo. 352; *Rutledge v. Railroad*, 110 Mo. 312; *Henry v. Railroad*, 76 Mo. 294; *McGrath v. Transit Co.*, 197 Mo. 94; *Warner v. Railroad*, 178 Mo. 133; *Epperson v. Telegraph Co.*, 155 Mo. 346; *Evans & Howard Brick Co. v. Railroad*, 17 Mo. App. 624; *Hudson v. Railroad*, 32 Mo. App. 667; *Brown v. Railroad*, 20 Mo. App. 222; *Saxton v. Railroad*, 98 Mo. App. 494; *Breen v. Cooperage Co.*, 50 Mo. App. 202; *Cothron v. Packing Co.*, 98 Mo. App. 349; *Foley v. McMahon*, 114 Mo. App. 442; *Lawrence v. Ice Co.*, 119 Mo. App. 328; *Moriarty v. S. & S. Co.*, 112 S. W. 1034; *Hodges v. Railroad*, 116 S. W. 1131; *Glick v. Railway*, 57 Mo. App. 97; *Smart v. Kansas City*, 91 Mo. App. 586; *Bank v. Railroad*, 40 Mo. App. 458; *Bradford v. Railroad*, 64 Mo. App. 475; *Columbia v. Railroad*, 69 Pac. 338; *Huber v. Railroad*, 92 Wis. 636; *Block v. Railroad*, 89 Wis. 378, 27 L. R. A. 365; *Bliel*

v. Railroad, 98 Mich. 228; Mauch v. Hartford, 87 N. W. 816; Bajus v. Railroad (N. Y.), 28 Am. and Eng. R. R. Cases, 499; Schwartzschild & S. Co. v. Weeks, 72 Kan. 190; Railroad v. Kelley, 91 Tenn. 704; Deming & Co. v. Cotton Press, 90 Tenn. 353; Ohl v. Bethlehem Township, 199 Pa. 588; Yoders v. Antwell Township, 172 Pa. 454; Hoag v. Railroad, 85 Pa. 293, 27 Am. Rep. 653; Railroad v. Sipes (Colo.), 55 Pac. 1093; Lining v. Railroad, 81 Iowa 246; Butcher v. Railroad, 37 West Va. 180; Railway v. Mutch (Ala.), 11 South. 894, 21 L. R. A. 316; Troy v. Railroad, 99 Conn. 306, 6 Am. St. Rep. 521; Isbell v. Railroad, 27 Conn. 406, 71 Am. Dec., 78; Smith v. Bank, 99 Mass. 605, 97 Am. Dec. 59; Searles v. Railroad, 101 N. Y. 61; Goodlander v. Standard Oil Co., 64 Fed. 400; Pierce v. Kile, 80 Fed. 865; Lindvall v. Woods, 44 Fed. 857; Railway Co. v. Kellogg, 94 U. S. 469; Scheffer v. Railroad, 105 U. S. 249; Insurance Co. v. Boon, 95 U. S. 130. (2) The rule *res ipsa loquitur*, has no application to the facts in this case, because, first: In this case, the facts are susceptible of direct and positive proof by living witnesses; and, second, The proof of the injury was as accessible to the plaintiff as to the defendant. Klebe v. Distilling Co., 207 Mo. 480; Bowen v. Railroad, 95 Mo. 268; Oglesby v. Railway Co., 177 Mo. 272; Fuchs v. City of St. Louis, 167 Mo. 620; Bohn v. Railway Co., 106 Mo. 429; Ash v. Verlenden, 154 Pa. 246, 26 Atl. 374; Stackpole v. Wray, 77 N. Y. Supp. 633; Griffin v. Manice, 166 N. Y. 188; Searles v. Railway Co., 101 N. Y. 662; Dobbins v. Brown, 119 N. Y. 188; Starer v. Stern, 91 N. Y. Supp. 821; Mining Co. v. Kitts, 42 Mich. 35; Brownfield v. Railway Co., 107 Iowa 254; Lehman v. Plumbing Co. (Minn.), 116 N. W. 552; Tibbitts v. Railroad, 115 N. W. 1021; Moriarty v. S. & S. Co., 112 S. W. 1034; Coal Co. v. Jones (Ky.), 118 S. W. 342; Railroad v. Hill, 79 Ark. 80; Railway v. Harper, 44 Ark. 527; Railroad v. Gaines, 46 Ark. 555; Railroad v. Rice, 51 Ark. 467; Ross v. Cotton Mills, 140 N. C. 115; Peters v. Light Co. (Va.),

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61 S. E. 745; Robinson v. Gas Co. (N. Y.), 86 N. E. 805; Patton v. Railway Co., 179 U. S. 658; Texas Pac. Ry. Co. v. Barrett, 166 U. S. 617; Shandrew v. Railroad, 142 Fed. 330. (3) It was incumbent upon respondent at the trial to establish by a preponderance of the evidence, the negligence of appellant and to show a causal connection between such negligence and the injuries that resulted in her husband's death. This she did not do, and it was error to refuse appellant's demurrer to her evidence. Rutledge v. Railroad, 110 Mo. 312; Hudson v. Railroad, 32 Mo. App. 667; Hodges v. Railroad, 116 S. W. 1131; Kearns v. Railway Co. (N. C.), 52 S. E. 131; Byrd v. Southern Express Co. (N. C.), 51 S. E. 851; Lumber Co. v. Mills (Ala.), 42 South. 1023; Car Wheel Co. v. Mehaffey, 128 Ala. 242; Railroad v. Quick, 125 Ala. 561; Richards v. Steel & Iron Co. (Ala.), 41 South. 288; O'Connor v. Railroad, 106 N. W. 161; Kennedy v. Navigation Co. (N. J.), 72 Atl. 382. And, while this causal connection may be shown either by direct or circumstantial evidence, it must be stronger than merely consistent with plaintiff's theory of how the accident occurred. If the proof is equally balanced, or, if the facts are as consistent with one theory as another, plaintiff can not recover. O'Connor v. Railroad, supra; McGrath v. Transit Co., 197 Mo. 97; Gettys v. Transit Co., 103 Mo. App. 564; Rissler v. Transit Co., 113 Mo. App. 120; Ries v. Transit Co., 179 Mo. 1; Moore v. Lindell Railway Co., 176 Mo. 528; Hawkins v. Railroad (Mo. App.), 116 S. W. loc. cit. 19; Bogan v. Railroad, 129 N. C. 154, 39 S. E. 808; Ashback v. Railroad, 74 Iowa 261, 37 N. W. 182; Wheelan v. Railroad, 85 Iowa 167, 52 N. W. 119; Rhines v. Railroad, 75 Iowa 597, 39 N. W. 912; Neal v. Railroad (Iowa), 105 N. W. 197; Tibbitts v. Railroad, 115 N. W. 1021; Lehman v. Plumbing Co., 116 N. W. 352; Koslowski v. Thayer, 66 Minn. 150, 68 N. W. 973; Sash & Door Co. v. Railway Co., 89 Minn. 143; Ulseth v. Lumber Co.,

97 Minn. 179; *Stewart v. Carpet Co.* (N. C.), 50 S. E. 562; *Edgar v. Railway Co.* (Utah), 90 Pac. 745; *Fritz v. Electric Light Co.*, 18 Utah 493; *Sorensen v. Paper Co.*, 56 Wis. 338; *Deserant v. Coal R. Co.*, 55 Pac. 290; *Shaw v. Gold Mining Co.*, 77 Pac. 575; *Ryan v. Iron Works Co.* (Mass.), 86 N. E. 310; *Kennerson v. St. Ry. Co.*, 168 Mass. 1; *Saxe v. Walworth Mfg. Co.*, 191 Mass. 338; *Hill v. Sporting Goods Co.*, 188 Mass. 75; *Flynn v. Beebe*, 98 Mass. 575; *Curtin v. Elevated Ry. Co.*, 194 Mass. 260; *Thompson v. Fire Works Co.*, 195 Mass. 328; *Hofnauer v. R. H. White Co.*, 186 Mass. 47; *Childs v. Express Co.*, 197 Mass. 337; *Railroad v. Cox's Adm'r* (Ky.), 104 S. W. 956; *Railroad v. Jolly's Adm'r* (Ky.), 90 S. W. 977; *Coal Co. v. Jones* (Ky.), 118 S. W. 343.

(4) There was an entire failure of proof of the allegation that the injuries to respondent's husband were caused by his foot being caught in an unblocked guard-rail or frog. On the contrary, the physical facts established upon the trial disprove the allegations of the petition in that respect, and it was error to refuse to direct a verdict for defendant. *Nugent v. Milling Co.*, 131 Mo. 256; *Trigg v. Ozark Land & Lumber Co.*, 187 Mo. 227; *Weltmer v. Bishop*, 171 Mo. 116; *Deane v. Transit Co.*, 91 S. W. 505; *Hook v. Railroad*, 162 Mo. 580; *Wray v. Railroad*, 68 Mo. App. 389; *Baker v. Railroad*, 122 Mo. 593; *State v. Bryant*, 102 Mo. 32; *State v. Nelson*, 118 Mo. 126; *State v. Brown*, 119 Mo. 538; *Pickens v. Metropolitan Ry. Co.*, 103 S. W. 124; *Payne v. Railroad*, 136 Mo. 576; *Spiro v. Transit Co.*, 102 Mo. App. 265; *Gurley v. Railroad*, 104 Mo. 211; *Waters-Pierce Oil Co. v. Kinsel*, 79 Ark. 608; *Waters-Pierce Oil Co. v. Van Eldereen*, 106 S. W. 947; *Waters-Pierce Oil Co. v. Van Eldereen*, 137 Fed. 567; *Railroad v. Morgart* (Ark.), 19 S. W. 751; *Artz v. Railroad*, 34 Iowa 152; *Meyers v. Railroad*, 24 Atl. 747; *Blumenthal v. Railroad*, 44 Atl. 750; *Jeske v. Irvin*, 44 S. W. 1062; *Keller v. Railroad*, 73 N. E. 965; *Dolfini v. Railroad*, 70 N. E. 69; *McClintock v. Railroad*, 6 Am. Neg. Cases,

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228; Morland v. Railroad, 16 Atl. 623; Byersdorf v. Sash & Door Co., 84 N. W. 861; Mushbach v. Chair Co., 84 N. W. 39; Crawley v. Railroad, 77 N. W. 179; Badger v. Cotton Mills, 95 Wis. 599, 70 N. W. 687; Vorbrich v. Manufacturing Co., 96 Wis. 277, 71 N. W. 434; O'Brien v. Railroad, 102 Wis. 628, 78 N. W. 1084. (5) Respondent's husband was guilty of contributory negligence as a matter of law in needlessly going between the cars to uncouple them when he had a comparatively safe place to perform that duty by remaining on the outside of the cars. Moore v. Railroad, 146 Mo. 572; Morris v. Railroad, 108 Fed. 747; Gilbert v. Railroad, 128 Fed. 529; Dawson v. Railroad, 114 Fed. 870; Railroad v. O'Shaughnessy, 122 Ind. 588; Lorange v. Railway Co. (Mich.), 62 N. W. 137; Coal Co. v. Hoodlet, 129 Ind. 327; Publishing Co. v. Beaumeister (Va.), 47 S. E. 821; Schoultz v. Eckard Co., 112 La. 568; Railroad v. Estes, 37 Kas. 715; Carrier v. Railroad, 61 Kas. 447; Haven v. Bridge Co., 151 Pa. 620; Quirouet v. Ala., etc., Co., 111 Ga. 315; Railroad v. Hamlin (Ind.), 83 N. E. 343; Thompson on Neg., sec. 5372.

N. A. Mozley for respondent.

GOODE, J.—Plaintiff's former husband was killed by one or two of defendant's freight cars running over him on January 10, 1903. The deceased was then and had been for four or five months a switchman in defendant's railroad yards in the city of Cape Girardeau, and it was part of his duty to couple and uncouple cars while trains were being made up or changed on the tracks in the yards. In the performance of this duty he attempted to uncouple two freight cars from a train of eleven cars which was in backward motion at the rate of four to six miles an hour, and held together by couplers with lever attachments that could be reached by an employee and manipulated so as to uncouple cars without going between them, as the lever extended to within

three or four inches of the outer edge of the car it was on. Those cars were in motion and the evidence tends to show plaintiff walked from six feet to twenty yards by the side of the cars with his left hand on the lever, before going between them, then caught hold of a handhold and stepped or jumped on the brake beam of the front car. His feet slipped from the beam and he walked a few steps, or, as one witness said, "trotted," following the front car, when he sank down or was jerked down, fell across the guardrail or frog and the car in the rear ran over his left foot and thigh, crushing his arm and left thigh and injuring his hand and left foot, so he died in a few hours. A fellow employee (White) who was near deceased and saw his peril, shouted a warning to him that he would run into the frog or guardrail. This man was the one who saw most of the tragedy and was introduced by plaintiff. Among other things he testified it was unnecessary for deceased to go between the cars to uncouple them with the lever, and deceased was not in the line of duty when he went between them. This witness, who was in authority over deceased, was ten or fifteen feet away and thus described the accident:

"We was at the south of what we call the track lead, and was backing toward track No. 7, that crossed this Gulf track, and Jase was standing there, and I told him to cut off two cars and he caught hold of the lever and run along five or six feet, and dropped the lever and caught hold of the hand hold, and put his feet on the brake beam and his foot slipped off the brake beam. And I says 'Look out Jase, you will get your feet in that frog,' and he was trying to get his feet away from the wheels, and he fell kinder on his hands and knees; and I saw the wheels was going to run over him and I turned around.

"Q. Did he take any steps after his feet slipped off the brake beam? A. It looked like he went four or five feet with his right foot wobbling along the ground

or rail, trying to get his feet away from the wheels."

One witness said just before deceased slipped off the brake beam, he "had his left hand a hold of the pin lifting rod to cut the cars, and had the right hand upon the grip iron." The accident occurred in daylight at the intersection of two tracks, where there are what are termed "frogs" at the junction of the rails and a guardrail running parallel to the outside rail. This guardrail is sometimes called a frog," too, though technically a frog is a different contrivance. The guardrails are probably twelve or fourteen feet long and placed by the side of the main outside rails of the track, with a space two and one-half to four inches wide between the two for the flange of the car wheels to run in. Each end of the guardrails is flared so as to make the distance between it and the outside rail wider at the ends for a foot or a foot and one-half than is the space between the two rails where they run parallel to each other. When help reached deceased he was lying across the rails with his head and feet west of the west rail. His left shoe had two streaks of rust about three inches long, three-quarters of an inch above the sole and on either side. There was also a crease on the inside edge of the sole under the instep and "the spur piece was cupped up." Another witness said the sole was cupped and torn loose at the heel from the upper, and the marks on the upper were like they had been made by the balls of the rails. Witnesses differed as to the injury to the foot. Plaintiff swore it was mashed as flat as her hand, and another witness said it was mashed in at the instep; but the doctors said there was only a hole one could stick a finger in on top of the foot behind the third toe and reaching to the bone. The theory of plaintiff's case is that her husband, after his foot slipped off the brake beam and while he was walking along the track, struck the toe of his left shoe between the guardrail and the main rail and it hung there, causing him to be jerked down as the car he was holding to moved on, and the car

behind immediately ran over him. The space between the guard and the main rail was not blocked as the statute required, and this neglect is the main complaint of the petition, it being alleged deceased's left foot caught in said space. In defense, a general denial was pleaded; also negligence on the part of deceased which contributed to his injury, in carelessly, unnecessarily and against defendant's rule, stepping and walking between the cars while they were moving from four to six miles an hour, and carelessly permitting his foot to strike against the end of the guardrail. The cars deceased was working with were moving southward at the time on the west track of defendant's right of way, and at the instant he fell or was jerked down, he was walking with both feet between the rails of the track, or with his right foot on the ties on the outside of the west rail and his left foot inside the west rail; the testimony would support a finding either way. No witness testified positively the deceased caught his foot between the guardrail and the main rail and was thereby thrown down, but circumstances are relied on to prove he did. It is the contention of defendant his foot did not catch, but when his feet slipped off the brake beam, he followed the front car, still clutching the handrail, until he stumbled from striking his foot against the end of the guardrail. A more accurate statement of the position of defendant's counsel in this connection is, there was nothing in the evidence tending to prove deceased was run over in consequence of his foot hanging in the guardrail. It is their further contention it was a negligent act to go between the cars to uncouple them, inasmuch as this could be done by manipulating the lever from without and the cars were constructed in that manner to enable employees to couple them from the outside; further, that said act of negligence contributed to cause the casualty. Several witnesses gave testimony conducing to prove deceased did not catch his foot in the open

frog, but fell from slipping off the brake beam while he was standing on it, or as he endeavored to jump on it.

Perhaps some other facts would better be stated or items of testimony as given by the witnesses. A witness for plaintiff (Buckner) said deceased was running along between the cars, and "all at once he went down, right down under the wheels like something had jerked him—went right down that quick" (indicating). Witness saw him take hold of the lever as if to cut off a car. Deceased was between the cars when he saw him take hold of the lever and he ran along, witness supposed, for twenty yards after he had taken hold of the lever before he fell down; that he had hold of the lever. It is to be noted this witness and all the others but White testified to nothing going to show deceased endeavored to manipulate the lever of the safety coupler, except the statement about his walking or running by the side of the cars with his hand on it. At one place in his testimony White said, when asked how far deceased had gone before he got on the brake beam: "I couldn't say; seven or eight feet he run along there holding the lever up." Again White said deceased walked by the side of the cars "from seven to ten feet or somewhere along there." Buckner was standing about forty feet from the deceased; White was standing nearer. Besides portions of his testimony copied supra, the latter said: the cars were running five or six miles an hour when deceased went between them and put his feet on the brake beam; that deceased went but a few feet before falling after his feet slipped off the brake beam; that it was not necessary for him to go in there at all. When asked if the incidents he had detailed "occurred in almost an instant's time," he answered; "Yes, sir, a short space of time." Another witness who testified for defendant said:

"Q. Were you present when the accident happened? A. I was off at a very little distance, and saw the accident.

"Q. State in your own way what happened there, exactly? A. Well, Mr. Brannock was a switchman, as I understand what he was doing, and they were kicking two box cars on the side track and Mr. Brannock had hold of the pin lift rod to make the uncoupling with his left hand, and right hand hold of the grip iron on the end of the car; and he went to place his left foot upon the brake beam, and his foot slipped off; and it seemed to me when his foot slipped off he lost control of his wits, and let loose of the iron grip round, and fell directly there over the railroad track with his left leg across the rail, . . . the train was going south."

Said witness stated a brakeman would not necessarily have to go between the cars in order to uncouple them, as there was a lever to use which rendered it unnecessary to go between the rails; that after the feet of deceased slipped off the beam he did not take a step; that there was a grip iron at the end of the car eighteen to twenty inches long "intended for the protection of switchmen and brakemen to hold to." Another witness said he did not see Brannock get hold of the car, but saw his foot on the brake beam and "it looked like it slipped off as he put it on and the wheels struck him; I was standing to the east side of the track and across the track." This witness saw Brannock jump on the brake beam and said it looked like his foot slipped and he went under the wheels. The physician who attended deceased testified the latter stated to him while in the hospital "that he (Brannock) had slipped off the beam." A witness testified the accident occurred about four-thirty in the afternoon, when there was good daylight. The unblocked places between the main rails and the guardrails at the intersection of the tracks had been as they were throughout the period deceased had worked in the yards.

The main instruction for plaintiff, and the only one given at her request, except those on the measure of damages, told the jury, in effect, if they found her hus-

band was in defendant's employ as a brakeman, and in the course of his employment was engaged in switching, coupling and uncoupling cars in the railroad yards of defendant, and while so engaged at the intersection of the track of defendant with another track, "his foot became caught and fastened between the rails of a frog, or between the main rail and a guardrail, which were not at said time blocked or filled in such a way as would prevent, as far as possible, the foot of a person from becoming caught or fastened, and by reason thereof, the foot of said Jason W. Brannock was so caught, and he was run upon and over by the wheels of defendant's car, and soon thereafter died as a result of the injuries thus received, they will find the issue for the plaintiff." Many instructions were given at the instance of defendant. The jury were told if they found defendant negligently failed to block the guardrails and frogs in the vicinity where Brannock was injured, yet if they further found the guardrails and frogs where he worked were unblocked, and that condition existed at the time he entered defendant's employ, then he assumed the risk incident to his employment and the verdict must be for defendant, though his foot was caught in the unblocked guardrail; that though the jury found his foot was caught in the unblocked guardrail, yet if they found he negligently went between the cars and carelessly and negligently walked between the same, the verdict must be for defendant; if the jury found he stepped between moving cars and attempted to jump on the brake beam and his foot slipped, the verdict must be for defendant, even though his foot caught in the unblocked guardrail; if the jury found it was unnecessary for Brannock to go between the cars moving at the speed they were, he was guilty of contributory negligence and the verdict must be for defendant; that if it was against the rules and regulations of the company for Brannock to go between the cars, the verdict must be for defendant, even though his foot caught in an unblocked guard-

rail. Other instructions of a similar tenor were given at defendant's instance.

Some circumstances which would throw light on the casualty and assist in reaching a right conclusion are not in proof. No testimony was introduced as to the condition of the coupling appliance, whether it was in good or bad repair, rusty or worked freely, how long it commonly takes to lift a coupling pin by a lever when the appliance is in good order, and what is a reasonable effort to lift it by the lever. We disposed of the case at first on the assumption the safety coupler was in good order, because the abstracts of the record on which the case was submitted showed plaintiff's counsel induced the court to exclude evidence offered by defendant's counsel tending to prove its condition. A motion for rehearing was filed and counsel agreed this was an erroneous recital in the abstract, that no such evidence was offered at the trial, the mistake was due to evidence having been offered at the first trial and excluded, and in making up the present abstract, by inadvertence the offer and ruling were shown as though they occurred at the second trial. The court below instructed the jury against a verdict for plaintiff if deceased went between the moving cars in violation of a regulation of defendant, but evidence of what the rules were was rejected, because defendant offered secondary evidence; hence this instruction related to a question on which there was no evidence. If there were rules on the subject, likely they were relevant to the issues. Neither was any testimony put in about whether there was a custom at the yards for employees of defendant to go between moving cars to couple or uncouple them when the safety coupler failed to work, what the brake beam was, how it was contrived, whether it was a safe place for a brakeman to place himself, the usage of employees to get on it, and defendant's knowledge of the usage. The case would have been clearer if it had been more

fully developed, but we must dispose of the appeal as best we may on the record presented.

The evidence, especially that as to the creases, bends and general condition of the shoe of deceased, pointed directly enough to the conclusion that his foot caught between the main and the guardrail, to remit the issue to the jury for a finding, and we overrule the contention to the contrary.

A more perplexing problem is whether the facts in proof so plainly demonstrated contributory negligence on the part of the deceased that the court should have directed a verdict for defendant. The action was brought and first tried on the supposition that such a defense could not be pleaded in a case founded on a violation of the statute requiring railway companies to block frogs and guardrails, and the portion of the answer pleading the defense was struck out. But on the appeal the Supreme Court held this was error and rejected as unconstitutional the clause of the statute which declared the defense incompetent; declining, however, to pass on any other question than the error assigned on the trial court's ruling in striking out the portion of the answer wherein contributory negligence was pleaded. [Brannock v. Railroad, 200 Mo. 561, 98 S. W. 604.] Many cases more or less resembling this one have been cited by counsel on the question of whether the court should have taken the issue of contributory negligence from the jury. We have read them all and will say something of their bearing before dealing with the point on the facts in proof. Some of them cannot influence our decision because they were determined by a rule of law not accepted in this State in such cases; the decisions having been against recovery, rather because the injured person was held to have assumed the risk of working about unblocked frogs or guardrails, than because of his contributory negligence. [Denver, etc., R. R. v. Arrighi, 129 Fed. 347; Wood v. Locke, 148 Mass. 504; Gillin v. Railroad, 16 Am. and Eng. R. R.

Cases, 508; St. L., etc., R. R. v. Hynson, 101 Tex. 543, 109 S. W. 929; Appell, Admx., v. Railroad, 111 N. Y. 550.] Defendant company's omission to block its guard-rails was a violation of a statute of the state and negligent conduct. [R. S. 1899, sections 1123-1125; Stafford v. Adams, 113 Mo. App. 717, 88 S. W. 1130; Colliott v. Mfg. Co., 71 Mo. App. 171; Lore v. Mfg. Co., 160 Mo. 608, 622, 61 S. W. 678.] In Missouri an employee does not assume risks incident to the negligence of his employer (Curtis v. McNair, 173 Mo. 270) and for a stronger reason does not assume the risk of working about devices which the employer has not safeguarded as required by statute, even though the employee is aware of their condition. [Cases supra; Durant v. Mining Co., 97 Mo. 62, 10 S. W. 484; Bair v. Heibel, 103 Mo. App. 621, 77 S. W. 1017; Nairn v. Biscuit Co., 120 Mo. App. 144, 96 S. W. 679; McGinnis v. Printing Co., 122 Mo. App. 227, 232, 94 S. W. 4.]

In other cases cited for defendant, and particularly those from Federal courts, verdicts for plaintiffs were set aside on the ground the injured employees were shown conclusively to have been guilty of negligence contributing to cause the accident, when, as we think, the evidence on that issue would have been left to the jury if the decisions of the appellate tribunals of this State had controlled. Nevertheless those opinions are instructive and have shed light on the question we are to decide; for they proceeded on the theory that the true inquiry was whether the employee had needlessly exposed himself to danger. [Grand v. Railroad, 83 Mich. 564; Morris v. Id., 108 Fed. 747; Dawson v. Id., 114 Fed. 870; Gilbert v. Railroad, 128 Fed. 529; Riley v. Id., 133 Fed. 904; Suttle v. Id., 144 Fed. 668; Powell v. Id., 159 Fed. 864.]

Still others of the cited cases differ from this one in material facts. [Hamilton v. Mining Co., 108 Mo. 364, 18 S. W. 977; Hollenbeck v. Railroad, 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; Lee v. Railroad, 195 Mo. 400,

92 S. W. 614; Brady v. Id., 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195; Ashman v. Id., 90 Mich. 567.] In the first three of those cases, wherein our Supreme Court held the issues of the defendant's negligence and the injured parties' contributory negligence were for the jury, there was no safety coupler attached to the cars worked with, and the evidence went to prove it was necessary for the injured employee to go between them while they were moving, and in two of them a rule of the company was introduced, which authorized employees to go between moving cars to couple and uncouple, if their speed was slow and safe. [Hollenbeck v. Railroad, Lee v. Id., supra.] In the Brady case a safety coupler was attached to the cars and after a futile effort to work it, a brakeman went in to take out the coupling pin with his hand; while he was between them another employee uncoupled the cars by a lever on the opposite side from where the brakeman entered, thus letting them part and injuring the brakeman. That was not a case of injury by an unblocked guardrail; a usage of the employees, acquiesced in by the company, authorized them to go between cars when the automatic coupler failed to work, and it was held the employee who parted the cars suddenly could have known by proper care the perilous position of the brakeman between them. In the Michigan case the plaintiff was injured by his foot catching in a frog while he was between cars, endeavoring to extract a coupling pin. He had no safety lever to use and was bound to go between to extract the pin. The evidence showed no rule of the company forbade this, but, on the contrary, that it was customary for employees to do so in the presence of their superiors. In Towner v. Railroad, 52 Mo. App. 648, the rules of the defendant had been violated in passing between the cars, a fact noticed in Hollenbeck v. Railroad, as influential in leading to the result reached. In Montgomery v. Railroad, 109 Mo. App. 88, 83 S. W. 66, the plaintiff, for his own conven-

ience and not to perform a task, having already performed it, took a position of extra hazard.

The authorities appealed to by counsel as supporting their respective positions not being exactly in point, we must reason on the facts before us in the light of general principles. The prevalent rule is, that an employee who goes between moving cars joined by link and pin, to couple or uncouple them, is not necessarily guilty of negligence as a court matter. [1 Labatt, Master & Servant, section 855; 5 Thompson, Negligence, section 5595 and cases cited in notes to texts.] We have found no Missouri cases where the rule was declared, but several where it must have been taken for granted. [Hollenbeck v. Railroad, 141 Mo. supra.] Whether such an act is negligent or not, depends on its coincidents, especially the speed of the cars; and probably there would be no legal conclusion of negligence if the speed was not more than four to six miles an hour, the rate of motion of the cars deceased attempted to cut. The aspect of the question is altered when some device like a coupling stick, has been provided to enable cars to be cut or coupled without taking the risk of entering between them, and a rule prescribed forbidding the latter method. In such a case an employee who, in violation of the rule, resorts to the more dangerous method, instead of the safer one, is justly denied recovery. [Schaub v. Railroad, 106 Mo. 74, 16 S. W. 924; Francis v. Id., 110 Mo. 387, 19 S. W. 935; 5 Thompson, Negligence, sections 5583, 5585.] But if a condition arises which prevents the use of the safer method and an employee goes between the cars, the propriety of the act ought to be determined according to the principles which would apply if no safety device had been furnished, and courts have held it will be. [Citations in 5 Thompson, section 5585.] Beyond doubt if an automatic safety coupler designed to protect train crews from the hazards of coupling and parting cars by the old method has been provided by a railway company, and especially when

the equipment is exacted by legislation, it becomes the duty of crew-men to use the device, instead of exposing themselves to injury by the more dangerous mode when it is unnecessary to do so. Hence if it conclusively appeared deceased preferred to pass between the cars though he might have cut them from the outside by a proper effort, on no just theory could plaintiff be awarded damages for his death. [Pearson v. Railroad, 127 Ia. 13, 18; Atchison, etc., R. R. v. Rudolph, 78 Kas. 695; Gilbert v. Railroad, 129 Fed. 529.] Doubtless emergencies occur which call upon a trainman to cut or couple cars by the old method when the cars are equipped with automatic apparatus for the purpose, and consequently render the act not negligent in law, or, perhaps, at all; just as emergencies occur which warrant a brakeman to couple with his hand instead of a stick furnished for the purpose, and in disregard of a rule against going between moving cars, unless the rule purports to be imperative under all circumstances and no usage, acquiesced in by the company, justified its violation in the given contingency. If after a fair effort, the circumstances considered, to lift the coupling pin with a lever, Brannock could not do so, and there was not a rule prescribed and enforced by the defendant against his going between the cars to perform the task, and the danger of doing so was not so great, in consequence of the speed of the car or other immediate facts, as to have caused a railway man of ordinary skill and prudence to await a more favorable opportunity, then deceased did not commit a negligent act in going between. [Riffley v. Railroad, 72 Minn. 469.] As to whether the further act of getting on the brake beam was careless, depends on circumstances of which the record does not apprise us, such as the construction of the beam, the usage of railway men and possible rules of the defendant. The problem before us finally comes down to the inquiry often presented in cases involving the defense of contributory negligence; *i. e.*, whether it con-

clusively appeared deceased put himself in a place of extra hazard when no sufficient emergency justified the risk, either because his conduct was absolutely forbidden by defendant, or would have been declined by a prudent employee if not forbidden, or whether there was doubt about those matters for the jury to solve. Counsel for plaintiff argue there is presumed to have been a necessity to do as deceased did, because, as defendant invoked the defense of contributory negligence, the burden of proof rested on it to establish the defense *prima facie*, and plaintiff might lean on the presumption that her husband was acting with care when he lost his life. An answer to this argument of counsel is, their own witness said deceased went between the cars unnecessarily and outside the line of his duty; and though, for a reason assigned *infra*, we hold that statement was not conclusive against plaintiff, it was relevant evidence for the jury and sufficed to eliminate the presumption, were it otherwise controlling. [Higgins v. Railroad, 197 Mo. 300, 317, 95 S. W. 863.] In view of said testimony no presumption would be indulged; for when there is evidence on an issue of fact the truth is to be found from the evidence and not presumed to be so and so, as is done in the absence of evidence. [Higgins v. Railroad, *supra*.]

The next inquiry is, did plaintiff introduce evidence which sufficed to send the issue to the jury? In our first opinion we answered this question in the negative in consequence of taking for granted the safety coupler was in good working order, because plaintiff's counsel appeared to have prevented the reception of evidence offered to prove it was. As said *supra*, the record on which the appeal was submitted was incorrect in so stating, and correcting the mistake has taken away a circumstance very adverse to plaintiff's case. Plaintiff ought not to be concluded by White's testimony that it was unnecessary for deceased to go between the cars; for though he was her witness, that remark was an

opinion on the issue to be tried, rather than the statement of a fact; and, moreover, the testimony of a witness introduced by a party is not conclusive against the party if there is countervailing evidence, or for any reason the jury has the right to believe the contrary. [Brown v. Wood, 19 Mo. 475; Meyer Bros. Drug Co. v. McMahan, 50 Mo. App. 18.] The testimony of White that deceased walked by the car seven or eight feet, holding up the lever, unquestionably conduced to prove he attempted to lift the pin by the lever. This was the only positive testimony deceased lifted on the lever, as the other witnesses only said he held his hand on it. The point of difficulty in this connection is not whether there was evidence Brannock endeavored to lift the pin by the lever, but whether there was substantial evidence tending to prove the attempt was adequate, and such as a careful employee would have been satisfied with before taking the risk of entering between the cars. Holding up the lever while walking seven or eight feet, to keep up with cars moving from four to six miles an hour, or as fast as a person would travel in a rapid walk, was but a brief effort to lift the pin, the success of which might have been prevented by a tautness or twist of the cars, a curve in the track, or other impediment the progress of the cars would have obviated in a moment or two. We incline to think this testimony from White was not substantial proof of a reasonable effort to manipulate the lever. But another witness (Buckner) said Brannock walked by the cars for twenty yards with his hand on the lever. It is true the witness said Brannock went between before taking hold of the lever; but possibly Buckner was mistaken about the latter circumstance and right about the distance Brannock walked with his hand on the lever, and he may have been endeavoring over said distance to cut the cars by the lever. Moreover, that he was intent on the purpose to cut them appears from his being seen as he stepped

on the brake beam grasping a handhold with one hand, with the other placed on the coupling pin. We think there was substantial proof he made a reasonable effort to cut the cars from the outside before facing the hazard of going between, though aware other courts, which maybe are more expert than we are in what constitutes careful railroading, have given decisions that are authority for the contrary ruling. Our conclusion is in harmony with the opinion given by the Supreme Court of Iowa on quite similar facts, in *Pearson v. Railroad*, 127 Ia. 13, a case from which our Supreme Court, in *Brady v. Railroad*, *supra*, quoted with approval a passage wherein the reasoning of the Federal courts in the *Morris* and *Gilbert* cases, *supra*, was rejected. See, too, *Riffley v. Railroad*, 72 Minn. 469.

If the triers of the fact should find deceased was warranted to go between the cars, there remains the further question of whether he was warranted to take the risk of stepping on the brake beam. In other words, whether, all his acts and the situation and conditions considered, he exercised ordinary care. Thus much concerning the demand for a nonsuit.

We are urged to declare that even if deceased was careless, his carelessness did not contribute to the tragedy, because the unblocked space intervened and became the proximate cause of it. The evidence is uniform that the entrance of deceased between the cars and his stumble and fall, happened in a second or two, and we think if it be found he negligently, that is, without reasonable necessity, went between, or negligently stepped on the brake beam, his conduct must be treated as a concurrent cause with defendant's. So the immediate point was ruled on satisfactory reasoning and similar facts in the *Morris*, *Gilbert* and other cases, *supra*. In *Lake Erie, etc., Co. v. Craig*, the question whether a trainman who was injured by catching his foot in an open frog, had proximately contributed to the accident by needlessly going between cars, was ruled to be for

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the jury on the ground that if he went between carelessly, nevertheless he did not take the risk of injury from the frog, because he had no notice, actual or constructive, it was open, hence might count on the railway company having complied with its duty to block it. In *Gleason v. Railroad*, 73 Fed. 647, the same court nonsuited a plaintiff who had carelessly gone between cars and then stumbled over an impediment of a kind he was bound to anticipate, holding the employee's negligence was the proximate cause of his hurt. The *Craig* case is to be distinguished from this one, for *Brannock* must have known the condition of the tracks in the yard and the risk of getting his foot caught between unblocked rails, he having worked there for months. If he forgot the fact at the time, his forgetfulness will not take away the negligent quality of his conduct if he went between the cars without good reason to do so. Danger was to be apprehended from such a step, and this is the circumstance essential to connect a careless act with its consequence, as proximate cause of the latter; not anticipation of the very source of danger which existed. [*Brady v. Railroad*, 206 Mo. loc. cit. 537; 1 *Sher. and Redf., Negligence* (5 Ed.), sec. 29.] But ability to anticipate by ordinary forethought that harm is likely to result from the wrongful conduct of another, if one does a given careless act, is material on the question of whether said act is superseded as proximate cause of the ensuing harm. If the act of carelessness is performed knowing, or with good reason to know, it exposes the actor to injury from another's tort, and injury follows, the first carelessness remains a concurrent and proximate cause. [1 *Sher. & Redf.*, sec. 34.] If a man should carelessly walk along a highway when he sees another man is about tortiously to shoot across it, and while thus walking into danger is wounded, he would be regarded as having contributed proximately to the injury. *Brannock* knew of the open guardrail and its

dangers, and if he needlessly incurred them, he induced his own death.

The main instruction for plaintiff was erroneous because it omitted from consideration the defense of contributory negligence, and some of the instructions for defendant were too favorable.

The judgment is reversed and the cause remanded. All concur.

STATE ex rel. SARAH I. BAMBERGE, Relator, v.
CHARLES R. GRAVES, Respondent.

St. Louis Court of Appeals, March 8, 1910.

1. **APPEALS: Supersedeas Bond: Fixing Amount After Trial Term.** Where the court at a term subsequent to the one when an appeal was allowed had power to approve the bond, such approval was equivalent to fixing the amount of the bond at the former term and supplied the omission to do so when the appeal was allowed.
2. ———: ———: **Approval by Clerk.** Under section 809, Revised Statutes 1899, which provides the court may, on granting an appeal, fix the amount of the appeal bond and allow appellant time in vacation not exceeding ten days to file the same, subject to the approval of the clerk, the clerk has power to approve an appeal bond in vacation of court only.
3. ———: ———: ———: **Courts: Vacation.** Where a term of court ends on Saturday and court adjourns over Sunday, which is not a juridical day, to Monday, the beginning of a new term, there is no "vacation" of court so as to authorize the clerk to approve an appeal bond under section 809, Revised Statutes 1899.
4. ———: ———: ———: **Sunday.** The clerk has no right to approve an appeal bond on Sunday.
5. ———: ———: **Approval by Court at Subsequent Term.** Where, under section 809, Revised Statutes 1899, an appellant is granted ten days in which to file an appeal bond and the time thus granted carries over into the next regular term, it becomes the power and duty of the court during the latter term and within the ten days to take and approve the appeal bond.

Original Proceeding by Mandamus.

WRIT DENIED.

J. F. Merryman for relator.

(1) Mandamus is the proper and the only remedy. State ex rel. Wolff v. Vogel, 6 Mo. App. 526. Mandamus will lie to compel a circuit clerk to issue execution where he has wrongfully refused to do so. Wolff v. Vogel, supra; State ex rel. v. Renick, 157 Mo. 292. (2) Neither the court nor the clerk had the power under the order issued at the December term on the 27th day of January, 1910, to approve any bond in said cause after the expiration of the December term. The court cannot justify its actions in approving the bond in the cause at bar under section 816 after adjournment of the term for reasons stated aforesaid and because section 816 refers not only to section 809, but to section 810 in which it is provided under certain circumstances wherein judges of the Supreme Court or court of appeals may grant an appeal and also to section 815 stating the effect of a recognizance, but section 816 is mandatory, in that it says: "That the court shall fix the amount or sum in which it shall be taken, therefore, the authority for a judge to approve a bond in vacation or after the adjournment of the term must be found in the amendment of section 809 in 1885. If the amendment of 1885 grants to the judge of the court power to approve the bond in the cause at bar under its order of January 27th, then the bond is valid and relator should not have a peremptory writ of mandamus. The word may in the clause "that the court may at the time of granting" means shall. State ex rel. v. King, 136 Mo. 318; Steins v. Franklin County, 48 Mo. 178, quoting from the Newberg Turnpike Co. v. Miller, 15 Johns Chy. 113; 42 Mo. 171; 48 Mo. 167; 72 Mo. 443. In the construction of statutes, the word may should be construed to mean

shall where substantial rights are involved. *Ellison v. Rawlston*, 19 Mo. App. 537. The amendment of 1885 should therefore be construed to read, "that the court shall at the time of granting an appeal by order of record fix the amount of the appeal bond." It therefore follows from the *Dillon* case (98 Mo. 93) and from the authorities cited above construing may as shall, that it was mandatory upon Judge William M. Kinsey at the December term of the court to have fixed the amount of the bond and enter it of record. This he did not do, but made an order that the appellant had "fifteen (15) days in which to perfect and file appeal bond herein." It therefore being mandatory for him to fix the bond and enter it of record at the December term, he cannot fix it at the February term, which he did by refusing a bond in the sum of \$1780 and accepting one in the sum of \$2000. The clerk alone has the power to approve a bond after the adjournment of court when an order has been properly entered giving him authority to approve. *Cockrell v. Owen*, 10 Mo. 287; *Julian v. Rodgers*, 87 Mo. 229.

Glendy B. Arnold for respondent.

GOODE, J.—This opinion is delivered on an application to this court for a writ of mandamus to respondent, clerk of the circuit court of the city of St. Louis, directing him to issue an execution on a judgment recovered by relator, November 26, 1909, in Division No. 7, of said court, for the sum of \$890.13, against the Supreme Tribe of Ben Hur, a corporation. The alternative writ was waived and the case submitted on a demurrer to the petition for said writ. The substance of the petition will appear from the recital of the facts of the controversy. After the rendition of the judgment a motion for new trial was filed in due time, overruled January 24, 1910, one of the days of the regular December term, 1909, an affidavit for appeal filed

January 27th and during said December term, an appeal was allowed on said day and defendant granted sixty days therefrom to file a bill of exceptions, "and also fifteen days in which to perfect and file an appeal bond herein," to quote the language of the order of record. The order allowing time in which to file the bill of exceptions and an appeal bond was, as said, entered January 27, 1910, and during the December term, 1909. That term adjourned to court in course on Saturday, February 5, 1910. The February term commenced the ensuing Monday, or February 7, 1910, and on Friday, February 11th, during said February term, and inside of ten days after the end of the December term, and of the last day of it when the appeal was allowed, the defendant, the Supreme Tribe of Ben Hur, presented in open court an appeal bond in the sum of two thousand dollars in statutory form, and the court approved it against the protest of relator. Afterwards, on February 16, 1910, during said term, relator applied to the clerk of the circuit court for an execution on her judgment against said Tribe, tendering the fee for the execution, but respondent refused to accept the fee or issue the execution. Afterwards relator applied to the circuit court for an order on the clerk to compel him to issue an execution, but the circuit court refused to make an order; whereupon relator applied to this court for a writ of mandamus. The contention for relator is the appeal bond offered by the Supreme Tribe of Ben Hur and approved by the circuit court did not operate to stay execution for these reasons: The circuit court failed to fix the amount of the appeal bond when it allowed time to defendant in the action to file the bond after the expiration of the December term, and the bond was approved after said adjournment by the court at a subsequent term, instead of by the clerk of the court as the statute provides. Prior to 1885 an appeal from a judgment of the circuit court did not stay execution unless the appellant or some responsible person for him,

together with two sufficient securities, to be approved by the court, entered into a statutory recognizance during the term at which the judgment was rendered. [R. S. 1899, sec. 809.] In 1885 the section as it then stood was amended by adding this proviso:

“Provided, however, that the court may, at the time of granting an appeal, by order of record, fix the amount of the appeal bond and allow appellant time in vacation, not exceeding ten days, to file the same, subject to the approval of the clerk, and such appeal bond, approved by the clerk and filed within the time specified in such order, shall have the effect to stay the execution thereafter, and if any execution shall have been taken prior to the filing of said bond, the same shall be released.” [R. S. 1899, sec. 809.]

Before the amendment was enacted, it had been held a bond taken and approved after the adjournment of the term at which judgment was rendered, did not stay execution. [Long v. Disner, 72 Mo. 655; Julian v. Rogers, 87 Mo. 229.] In other cases it was held an appeal bond that did not comply with the statutory requirements would not operate as a supersedeas. [State ex rel. v. Vogel, 6 Mo. App. 526.] The amending statute dealt with several sections of the Practice Act relating to appeals and provided among other things, for the filing of bills of exceptions after the term at which the exceptions were taken, either in the court or with the clerk in vacation, and also for the filing of an appeal bond in vacation, not exceeding ten days after the term. [Session Acts 1885, p. 214.] Counsel for relator argues that as an appeal bond filed prior to the amendment did not stay execution unless the statutory provisions then in force were complied with, so one filed in vacation since the amendment will not stay execution, unless the amendment is strictly observed. Continuing this line of reasoning, said counsel insists no bond could be approved in vacation unless the court, at the time of granting the appeal, had fixed the amount of the

bond and allowed the appellant to file it in vacation; and even if this had been done, no one but the clerk had power to approve the bond; citing *State ex rel. v. Dillon*, 98 Mo. 93, 11 S. W. 255, and *Bank v. Moulder*, 53 Mo. App. 535. In the *Dillon* case it was held to be the duty of the circuit court when an appeal was allowed, to fix the amount of the bond, but held, also, if the court approved a bond of less than the statutory penalty, that is, less than double the amount of the debt, damages and costs, the bond thus approved would stay execution. Said case is no authority for the proposition that an omission by the court to fix the amount of the bond will prevent it from staying execution if taken and approved under the circumstances shown in this case; though we do not say a bond approved by the clerk in vacation pursuant to an order of the court which did not fix its amount, would suffice to stay execution. We merely hold in this connection the *Dillon* case is not in point. In *Bank v. Moulder*, the court decided an appeal bond lodged with the files of the case in vacation, we suppose pursuant to an order allowing the bond to be filed in vacation, did not become valid and effective if never approved by the clerk. Said authority is out of point and throws no light on the question before us. The bond filed by defendant, the Supreme Tribe of Ben Hur, was presented in open court and approved by the court. This action was taken at a term subsequent to the one when the appeal was allowed, and the only question of doubt is whether the court had power to approve it at the subsequent term. If it had such power, its approval was equivalent to fixing the amount of the bond and supplied the omission to do so when the appeal was allowed. This was decided in *State ex rel. v. Dillon*, 98 Mo. supra; *American Brew. Co. v. Talbot*, 135 Mo. 170, 36 S. W. 657, and *State ex rel. v. Klein*, 137 Mo. 673, 39 S. W. 272.

We take up next the contention that the statute authorized the approval of the bond after the term at

which the appeal was granted only by the clerk of the court and not by the court itself. Power is conferred on the clerk to approve appeal bonds only in vacation of the court, and in this instance there was no vacation; as the court adjourned from Saturday over Sunday, which was not a juridical day, to Monday, the beginning of the new term. It is true the section of the statute which provides how statutory words and phrases shall be construed, says whenever a power is given to a court, or judge thereof in vacation, or whenever any act is authorized to be done by or any power is given to a clerk of any court in vacation, the words "in vacation" shall be held to include an adjournment of court for more than one day. [R. S. 1899, sec. 4160.] Taking account of that section, we still think the clerk would have had no power to approve this bond under the proviso of section 809. Though the adjournment was for more than one day in the sense of being for more than twenty-four hours, it was not more than one day, if Sunday, a day on which a court is forbidden to sit or transact business, is excluded. [R. S. 1899, sec. 1615.] The clerk could not approve this bond on Sunday, and on Monday there was no vacation on any theory, in our judgment, because court was in session, a new term having opened. But counsel for relator says, in order to give effect to the statute, we ought to hold the vacation continued for ten days in such sense as to permit the clerk to approve the bond. We think nothing in the statute justifies such a ruling. If we should follow the reasoning of counsel and be controlled strictly by the language of the proviso, we would have to deny the court could allow a bond to be filed after the adjournment of the term in which the appeal was allowed if another term would instantly ensue. This is true because the proviso says the court, at the time of granting the appeal may allow the appellant time *in vacation* not exceeding ten days, in which to file a bond. If no vacation was to follow within which the bond could

be filed or none of ten days' length, then on the construction of relator's counsel, the bare fact another term would begin shortly after an appeal is granted, would prevent any extension of time in the one case, or for ten days in the other, beyond the term at which the appeal was granted for the filing of a supersedeas bond. A more liberal construction ought to be given to the law and one which, instead of enforcing the letter of the statute, will realize the purpose the Legislature had in mind; namely, to afford appealing parties an opportunity to stay execution by filing an appeal bond within ten days after the judgment term. Not thinking of the chance of one regular term running up to the beginning of another, the words of the proviso related only to a vacation between regular terms, and during this interval the clerk was empowered to perform an act which otherwise and usually pertains to the court. But the clear intention was to get rid of the previous situation in which the bond had to be approved during the term at which the judgment was rendered and the appeal granted. Hence we think it is fairly to be implied from the amendment that if the ten days which may be allowed after said term will carry over into the next regular term, it becomes the power and duty of the court during the latter term and within said ten days, to take and approve appeal bonds. We deem the bond given by the Supreme Tribe of Ben Hur and approved by the court a valid one and operative as a supersedeas.

It should be stated that although the court allowed fifteen days after the appeal in question was granted in which to file the bond, it was actually filed within ten days from the adjournment of the term. It should be stated also no question is made about the amount of the bond or the sufficiency and responsibility of the sureties.

The writ of mandamus will be denied. All concur.

NEWTON L. RAY, Respondent, v. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,
Appellant.

St. Louis Court of Appeals, March 8, 1910.

1. **CARRIERS OF PASSENGERS: Injury to Passenger: Freight Train: Proximate Cause of Injury.** Where a passenger on a freight train attempts to board it while moving and actually grabs the handrods and gets his feet on the steps of the caboose and is then thrown off by a jerk of the train, any antecedent negligent acts of the operatives of the train inducing the passenger to attempt to get on could not be the legal cause of the injury.
2. ———: ———: ———: **Risks Assumed.** A person who takes passage on a freight train assumes the risk of injury from such jars and movements as are incident to its operation, if its parts are well constructed and in good repair and it is properly operated on a safe track, but does not assume the risk of injury from faults in either of these matters.
3. ———: ———: ———: **Jerks: Res Ipsa Loquitur.** The mere fact that a person, in attempting to board a moving freight train, which was getting under full speed, is thrown off by a jerk of the train, does not warrant the conclusion of defective track or train appliances or negligent operation, and hence the doctrine of *res ipsa loquitur* does not apply.
4. ———: ———: ———: **Unusual Jerks: Evidence: Competency of Expert Witness.** A passenger who is jerked from a freight train does not qualify as an expert, entitled to give an opinion that the jerk was an extraordinary one, by testifying that he had had considerable experience on such trains and had shipped stock over the road for seven years, not testifying how often he accompanied his stock.
5. ———: ———: ———: ———: **Opinion Evidence: Non-Expert Witness.** An expression of opinion by a non-expert witness that a jerk of a freight train was an unusual and extraordinary one possesses no probative value.
6. ———: ———: ———: **Jerks: Evidence Insufficient to Show Negligence: Facts Stated.** In an action against a railroad company for injuries to a passenger by being jerked from the rear platform of a freight train caboose, which he had just boarded,

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the train being in motion when he did so, where there was no evidence to prove the train or caboose was in imperfect condition, the track out of order, or the existence of any physical defect that could cause an unusual jar or jerk of the train, and no article on the train or caboose was misplaced nor any person but plaintiff disturbed, and the only evidence adduced with respect to the character of the jerk was that given by plaintiff, who testified it was an unusual and extraordinary one, it is *held* there was no substantial evidence the jerk was imputable to defendant's negligence.

Appeal from the Lewis Circuit Court.—*Hon. Chas. D. Stewart*, Judge.

REVERSED.

E. L. Marchand, R. W. Ray and *Trimble & Trimble* for appellant.

(1) The burden of proving the negligence charged in this case, rests on respondent. *Bartley v. Railroad*, 124 Mo. 140; *Hite v. Railroad*, 130 Mo. 136; *Guffey v. Railroad*, 55 Mo. App. 466; *Hedrick v. Railroad*, 195 Mo. 104; *Garvin v. St. Louis*, 151 Mo. 334; *Saxton v. Railroad*, 98 Mo. App. 503; *Schaffer v. Railroad*, 128 Mo. 64; *Yarnell v. Railroad*, 113 Mo. 570; *Railroad v. MacKinney*, 135 Pa. St. 402, 37 Am. and Eng. 158; *Curtis v. Railroad*, 18 N. Y. 534; *Railroad v. Kuhn*, 6 S. W. (Ky.) 441; *Elliott on Railroads* (2 Ed.), §. 1644, notes 228, 229, 230 and 231; *Woas v. Railroad*, 198 Mo. 664. (2) It is a matter of common knowledge that jerks and jolts are incident to freight trains. Courts take judicial notice of these incidents. *Young v. Railroad*, 113 Mo. App. 636, 84 S. W. 176; *Erwin v. Railroad*, 94 Mo. App. 289; *Prior v. Railroad*, 85 Mo. App. 367; *Wart v. Railroad*, 165 Mo. 612; *Hedrick v. Railroad*, 195 Mo. 104; *Portuchek v. Railroad*, 101 Mo. App. 54; *Olds v. Railroad*, 172 Mass. 73; *Railroad v. Priol*, 144 Ill. 261; *Guffey v. Railroad*, 53 Mo. App. 462. (3) Evidence in the nature of the conclusion of a witness that the jerk was extraordinary is of no value.

Hedrick v. Railroad, 195 Mo. 104; Portuchek v. Railroad, 101 Mo. 54; Wart v. Railroad, 165 Mo. 612; Erwin v. Railroad, 94 Mo. App. 289; Bartley v. Railroad, 148 Mo. 124; Guffey v. Railroad, 53 Mo. App. 465; Hite v. Railroad, 130 Mo. 136; Saxon v. Railroad, 98 Mo. App. 501; Henry v. Railroad, 76 Mo. 293. (4) Evidence that there was a hard jerk is not sufficient to raise a presumption of negligence. The evidence must go further and show that the jerk resulted from a defect in track or machinery or misconduct of trainmen. Bartley v. Railroad, 148 Mo. App. 124; Hite v. Railroad, 130 Mo. 136; Guffey v. Railroad, 53 Mo. App. 462; Hedrick v. Railroad, 195 Mo. App. 104; Wait v. Railroad, 165 Mo. 612; Railroad v. Arnold, 144 Ill. 261; Erwin v. Railroad, 94 Mo. App. 289; Saxon v. Railroad, 98 Mo. App. 501; Holt v. Railroad, 84 Mo. App. 443; Prior v. Railroad, 85 Mo. App. 378. (5) Starting the train without warning respondent that the caboose would not stop at the platform, was not the proximate cause of the injury. Saxon v. Railroad, 98 Mo. App. 501; Blue v. Railroad, 98 Mich. 225; Ins. Co. v. Boon, 95 U. S. 117. (6) The statement of the brakeman was not an order. It was a mere statement that the train would not stop. Heaton v. Railroad, 65 Mo. App. 479; Hunter v. Railroad, 126 N. Y. 18; Murphy v. Railroad, 43 Mo. App. 343; Vincent v. Railroad, 71 Iowa 58, 32 N. W. 100; Lindsey v. Railroad, 47 Iowa 407, 20 N. W. 737; Dietrick v. Railroad, 58 Md. 347, 11 Am. and Eng. R. R. Cas. 115. There is no presumption that the brakeman had authority to order or direct Ray to board the caboose. Farber v. Railroad, 116 Mo. 81. (7) The attempt to board a train in motion is presumptive negligence. 1 Fetter on Carriers, p. 378, sec. 149. (8) Plaintiff cannot justify his act in attempting to board the train while in motion except by showing that he acted under coercion of circumstances. This he wholly fails to do. Heaton v. Railroad, 65 Mo. App. 479; Solomon v. Railroad, 103 N. Y. 437; Hinton v. Railroad,

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126 N. Y. 18; *Victor v. Railroad*, 30 Atl. (Pa.) 38. (9) Technical phrases in instructions constitute error. *Mulderig v. Railroad*, 94 S. W. 801.

O. C. Clay and *A. F. Haney* for respondent.

(1) Railroad companies are held to the highest care and skill in preventing injuries to their passengers "which prudent men would use and exercise in a like business and under like circumstances." *Redmon v. Railroad*, 185 Mo. 1; *Jackson v. Railroad*, 118 Mo. 199; *Higgins v. Railroad*, 36 Mo. 418; *Sullivan v. Railroad*, 133 Mo. 1; *Tillman v. Transit Co.*, 102 Mo. App. 553; *Huelsenkamp v. Railroad*, 37 Mo. 537. But, on the other hand, the law requires of the passenger no more than the exercise of ordinary care for his safety. *Mitchell v. Railroad*, 112 S. W. 291; *Huelsenkamp v. Railroad*, 37 Mo. 537; *Hensler v. Stix*, 113 Mo. App. 162. (2) Where a railroad company carries passengers for hire on its freight trains, it must exercise the same degree of care as is required in the operation of its regular passenger trains, the difference only being that the passenger submits himself to the inconvenience and danger necessarily attending that mode of conveyance. *Wait v. Railroad*, 165 Mo. 612; *Irwin v. Railroad*, 94 Mo. App. 289; *Guffey v. Railroad*, 53 Mo. App. 462; *McGee v. Railroad*, 92 Mo. 208; *Wagner v. Railroad*, 97 Mo. 512; *Whitehead v. Railroad*, 99 Mo. 263; *Mitchell v. Railroad*, 112 S. W. 291. (3) The fact that the jerk in evidence was of sufficient violence to break plaintiff's hands loose from the handholds, and throw him from the car steps over the railing back of the car steps onto the railroad track, is sufficient evidence of the unusual and extraordinary character of the jerk, and prima-facie proof of the negligence of defendant's servants in the management of the train, and cast upon the defendant the burden of showing the jerk was produced by causes consistent with the careful management of the train. Plaintiff's direct evidence as to the unusual violence of

the jerk is also proof of defendant's negligence. Dougherty v. Railroad, 81 Mo. 325; Murphy v. Railroad, 43 Mo. App. 342; Dorsey v. Railroad, 83 Mo. App. 528; Mitchell v. Railroad, 112 S. W. 291; Hite v. Railroad, 130 Mo. 132; Condry v. Railroad, 13 Mo. App. 587; Bussell v. Railroad, 125 Mo. App. 441; Fullerton v. Railroad, 84 Mo. App. 498. (4) Where the facts are before the jury, the presumptions or inferences they warrant are for the jury. Cambron v. Railroad, 165 Mo. 543; Dorsey v. Railroad, 83 Mo. App. 528; Butts v. Bank, 99 Mo. App. 168. (5) The courts will not, as a matter of law, declare a person guilty of contributory negligence who attempts to get on a train while it is moving slowly, especially at a platform. The question of contributory negligence in such cases should be determined by the jury, under the guide of proper instructions, in the light of all the attending circumstances. Fulks v. Railroad, 111 Mo. 335; Schaefer v. Railroad, 128 Mo. 64; Hansberger v. Railroad, 82 Mo. App. 566; Peck v. Transit Co., 178 Mo. 617; Swigert v. Railroad, 75 Mo. 475; Eikenberry v. Transit Co., 103 Mo. App. 442; Spencer v. Transit Co., 111 Mo. App. 653. (6) Knowledge or notice may be proved either by direct evidence or inferred from other facts and circumstances. Rine v. Railroad, 100 Mo. 228. (7) Even if appellant's charge were true that respondent's instructions numbers 12 and 13 improperly included acts of negligence on the part of defendant's servants, in addition to that consisting in the negligent jerking of the train, yet that could be no ground for reversal. Gibler v. Railroad, 129 Mo. App. 93. (8) Under circumstances where it would not be negligence as a matter of law for plaintiff to get on or off a moving train, the statement of the brakeman to plaintiff to get on is to be regarded as a direction or invitation. Fillingham v. Transit Co., 102 Mo. App. 573; Seymour v. Railroad, 114 Mo. 266; Waller v. Railroad, 83 Mo. 608. (9) The use of the term "proximate cause" in instructions on negligence is sanc-

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tioned. *Deschner v. Railroad*, 200 Mo. 310; *Harrison v. El. Light Co.*, 195 Mo. 606. (10) Where the instructions asked by defendant are too voluminous the trial court would be upheld in refusing even all of them. *Dakin v. Mercantile Co.*, 197 Mo. 238; *Heman v. Hartmen*, 189 Mo. 20. (11) (a) Plaintiff assumed only the risk of injury resulting from the usual or ordinary jerks and jars incident to the operation of the freight train. (b) Plaintiff did not assume the danger arising from the negligence or want of proper care of those in charge of the train. *Mitchell v. Railroad*, 112 S. W. 291.

GOODE, J.—Appeal from a judgment for damages given to compensate plaintiff for a personal injury found to have been caused by the negligence of defendant's servants. Plaintiff had shipped a carload of cattle in a freight train from Canton, Missouri, over defendant's railroad destined ultimately to Chicago, Illinois, over a route which extended through West Quincy, Missouri. The train passed southward to LaGrange, between Canton and West Quincy, where about noon it took a sidetrack to let a passenger train pass. Plaintiff had accompanied the shipment, and while the freight train was on the sidetrack at LaGrange, he asked the rear brakeman (Gilfillan) if he (plaintiff) would have time to attend to his cattle. The brakeman replied there would be plenty of time; whereupon plaintiff left the caboose and paid some attention to his stock while the train was on the switch, walked from there to the depot, and again noticed the cattle after the train had moved to the depot on the departure of the passenger train. The freight train consisted of twenty-one cars, and as it stood at the depot on the main track, the engine and six or seven cars were south of the depot door and the remainder of the cars, with the caboose at the rear, were north of the door, the course of the

train being southward. When plaintiff went to the depot after first attending to his stock, he saw there the same brakeman who had told him he would have time to look after his cattle, and inquired of said brakeman when the train would start; but received an unresponsive answer. This occurred about five minutes before the train started to leave the station, where it remained a half-hour or more. The conductor was at the depot, saw plaintiff waiting there, knew he was a passenger on the train and that he was the only passenger, but said nothing to plaintiff nor plaintiff to him. Instead of getting on the caboose, plaintiff remained on the platform until the train had started, and then endeavored to board it as it passed him, going at a speed of from three to three and one-half miles an hour, he testified. Before making this attempt, he asked the brakeman, Gilfillan, who was standing on the platform of the caboose, to stop the train or slow it up so he could get on. Plaintiff said the caboose was just starting when he made this request, and "had not got down there yet," meaning, we presume, to the portion of the platform where he was standing. Gilfillan replied he would not stop the train or slow it down, and if plaintiff wanted to get on he would have to jump on. Plaintiff stated what passed between him and the brakeman with immaterial variations, and we quote one or two versions: "I asked him if he had not better slow the train so I could get on; he said: 'No, I will not slow up any; if you want to get on this train, jump on.'" Again: "I told the brakeman to slow the train up so I could get on; the caboose was just starting; it had not got down there yet; he said he would not do it; if I wanted to get on that train I would have to get on." The caboose would have moved some five hundred feet before it reached plaintiff. Testimony was put in to show it was the custom of stockmen on defendant's line to leave cabooses of freight trains at stations to attend to their stock upon statements of the trainmen that they would

have time to do so and as to when the train would leave the station. Much evidence was given that the train was moving at a more rapid speed when plaintiff attempted to get on board than he testified—at a rate of eight or ten miles an hour. Plaintiff took hold with each hand of the rods at the sides of the steps of the caboose, put his feet on the lower step and was in the act of putting one on the next step when there was a sudden and violent jerk of the train, the hold of his hands on the rods was loosened, he was thrown backward over the rear railing, fell between the rails of the track and sustained a severe injury to his knee, besides other injuries. We quote from plaintiff's testimony: "After he told me to get on the train I started to the train—down the track the way the train was going—not very fast but in a good walk. I stepped one foot on the lower step, caught the iron with my right hand and one with my left hand, and got both feet on the lower step; just as I went to step up on the other step, there came a jerk of the car and threw me over the back of the railing on to the steps;" (so the record reads). "The train went on; there was no one there; I tried to get up and found I could not get up; crawled up to the depot platform, got up, crawled up with one knee, and sat down, and was sitting there when Mr. Mitchell came up to the depot." The accident has been described according to the testimony for plaintiff for the purpose of passing on the contention of defendant of lack of proof of negligence in handling the train, and conclusive proof that plaintiff's own carelessness caused or contributed to his injury. The evidence for defendant conduced strongly to prove plaintiff had no conversation with Gilfillan at LaGrange, was not told by the latter to get on the caboose as it was moving, the conductor did not see plaintiff on the platform, there was no jerk of the train at all, plaintiff was hurt by grabbing the rods of the caboose in an improper way as the train was moving rapidly, from ten to twelve

miles an hour and that he never got his feet on the step. The station agent who stood near and saw the accident, describes it thus:

"As Mr. Ray attempted to board the train he got up near the platform as he saw the caboose approach the point where he was standing and stood there, and just as the caboose passed him he grabbed with both hands the handhold and grabiron just like any man would that didn't know anything about getting on a moving train. He stood perfectly still and the train jerked him in such a manner—he had a stick in his hand—and that swung him around, the force of the train, that broke his left handhold and he fell on the track facing west. . . . He got hold of the handhold, and, by the force of the train, it jerked him three or four steps, and by that time his right hand broke loose and he was still holding with his left hand to the grabiron, which is straight up and down, when the force of the train threw him around. . . . He got hold of the grabiron and also the handhold when he attempted to get on, and his right hand broke loose and he still held on with left hand with the stick in his hand when it swung him around the end of the car and he let loose and it swung him around on the rail when he dropped down.

"Q. About how fast in your judgment, was that train running when Mr. Ray undertook to board it? A. About eight or ten miles an hour.

"Q. State whether or not he got his feet, or either of them, on the step of the car during the time he fell off. A. No, he didn't touch the car only with his hands.

"Q. Where were his feet from the time you saw him take hold of the grabiron? A. On the platform.

"Q. Prior to the time when the train started from the depot, what were you doing? A. Just standing doing nothing."

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Testimony was given regarding the duties of the rear brakeman, the tendency of which was to prove he was the "head brakeman." or member of the train crew in authority in regard to the movements of the train and looking after the safety of passengers in situations which were not under the observation of the conductor. This testimony was given by the engineer:

"Q. State whether you did anything or performed any act that would cause a jerk? A. We did not.

"Q. Could the brakeman give the signal to stop the train if he wasn't on the train and was on the platform, after that train has run anywhere from 800 to 1000 feet, if the brakeman was standing on the platform, and how could he do it without getting on the train? A. He could not do it.

"Q. Is it your duty to be looking back after signals after you get your signal to go ahead? A. No.

"Q. What is your duty after you start out; I don't mean while switching around in the yards, but after you get the signal to go to the next station, what do you do? A. It is our duty to watch on ahead so that I hit nothing or any persons or anything.

"Q. State whether or not it is your duty then to be looking back? A. It is not."

A written statement signed by plaintiff a short time subsequent to the accident, was introduced to contradict his testimony given on the stand. The tendency of the document was to prove the accident was due to plaintiff's attempt to get on the train when it was moving too rapidly for the attempt to be prudent. Plaintiff testified the paper was signed while he was still ill from his injuries and had been taking morphine; and that it was neither read by nor to him. Several witnesses said plaintiff narrated the accident to them and laid it to his missing his footing when he tried to get on the caboose because the speed was too high. Plaintiff attempted to qualify as an expert witness in respect of shocks and jerks of freight trains by saying

he had had "considerable experience" on such trains, and had shipped stock over this road for seven years, not testifying how often he accompanied his stock.

The case has been exhaustively briefed from various points of view by counsel on both sides, but we think incidents which are unimportant have been dwelt on as tending to establish or refute the company's liability. The churlishness shown by the brakeman in not informing plaintiff when the train would leave in response to an inquiry, the omission of the conductor who saw plaintiff waiting on the platform to warn the latter before starting, and what the brakeman said to him about getting on the caboose as it moved past the platform, which is treated as an invitation to get on and as an assurance that he might safely do so, and failure to stop for plaintiff, are all drawn into the argument as facts going to show liability. For defendant, plaintiff's loitering about the platform after he had attended to his cattle, instead of getting on the caboose before the train moved, as he might have done, is said to show he was injured through his own fault, and the statement of the brakeman is argued to have been no more than a license to him to take the risk of boarding the caboose. Those circumstances strike us as immaterial because, according to plaintiff's own narrative, which we accept as true for the purposes of the appeal, he succeeded in getting on the steps of the caboose in safety. He testified he was thrown to the ground after he had grasped the handrods at the back platform with either hand, had set both feet on the bottom step and was in the act of putting one foot on the second step; that at this moment a jerk of the train occurred and threw him overboard. It follows the proximate cause of the accident was this jerk; not an antecedent act of negligence by either defendant's employees or plaintiff; and in instructions given for defendant, the court below so charged and conditioned the right to recover on findings of negligent handling of the train by the engineer and of due

care on the part of plaintiff. This accorded with the position taken by counsel for plaintiff as regards his alleged contributory negligence; for they say if he attempted to board the train when it was rash to do so, or made the attempt in a careless way, these circumstances could not have contributed to his fall since he succeeded in getting on safely and was afterwards thrown off. By the like reasoning it follows the antecedent acts of negligence, if any such occurred, on the part of defendant's train crew, were not the legal cause of the casualty. Therefore the question for decision is whether the jerk which precipitated plaintiff to the ground is attributable proximately to any negligence of defendant. The evidence relied on for this purpose was twofold: The testimony of plaintiff himself that the jerk was an unusual and extraordinary one; and the supposed effect of it in hurling him to the ground. A careful study of the entire record, in the light of precedents, has satisfied us there was no substantial evidence the jerk was imputable to defendant's negligence. The law governing the liability of railroad companies for an injury to a passenger on a freight train by oscillations of the train has been expounded in numerous decisions in this and other jurisdictions. A person who takes passage on that kind of train, assumes the risk of injury from such jars and movements as are incident to its operation, if its parts are well constructed and in good repair and it is properly operated on a safe track; but does not assume the risk of injury from faults in either of those matters, or perhaps kindred ones which an experienced railway man could enumerate but we cannot. [Hedrick v. Railroad, 195 Mo. 104, 93 S. W. 268.] The jerk said to have thrown plaintiff off his balance had no other noticeable consequence; it was not in evidence any article on the train or caboose was misplaced nor any person but plaintiff disturbed. The rear brakeman, who was standing on the rear platform, was not thrown off nor violently jostled. We are pointed to the fact that

the hold of plaintiff's hands on the rods was loosened by the jerk; but the degree of violence required to do this would depend on how tightly he was clasping the rods and also the firmness of his position on his feet. Under some circumstances a slight jar of a train will unbalance a person. It is in proof that while a train is leaving a station, the power of the steam is applied gradually, instead of being turned on at once in full force, and, indeed, the petition in the present case alleges the train was moving at an "accelerating speed." Taking into consideration the oscillations and jerks commonly and necessarily incident to the movement of a freight train and that this train was getting under full speed, we hold the mere fact that plaintiff was thrown off by a jerk did not warrant the conclusion of defective track or train appliances, or negligent operation; in other words, the doctrine of *res ipsa loquitur* does not apply. This is the necessary result of the cases cited *infra*, wherein it was held the evidence for the plaintiffs did not entitle them to a decision by the jury. This plaintiff said the jerk was an unusual and extraordinary one, but the cases hold such expressions of opinion by a nonexpert witness are not of probative value; and plaintiff no more qualified as an expert than did the witnesses in the following cases, who gave testimony tending to prove the shocks in issue were of unusual violence. Indeed his qualifications were inferior to some of said witnesses whose testimony was rejected. [Guffy v. Railroad, 53 Mo. App. 156; Hawk v. Railroad, 130 Mo. App. 658, 108 S. W. 1119; Hedrick v. Railroad, 195 Mo. 104, 93 S. W. 268; Wait v. Railroad, 165 Mo. 612, 65 S. W. 1028.] We are controlled by decisions of the Supreme Court and influenced by the decisions of other courts given in analogous cases, where the evidence relied on to show the accidents were occasioned by negligent jerks in the movement of freight and other trains, was stronger than it is in the case at bar, and yet there was held to be no evidence tending to estab-

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lish liability on the part of the railroad companies. Those authorities do not leave us free to determine this case according to general doctrines and as though it were one of first impression; but our judgment approves the conclusions reached in said cases. Plaintiff's counsel have endeavored to distinguish them from this one on the facts and show they ought not to control our decision; but the attempt has been unsuccessful. The record before us contains nothing to prove the train or caboose was in imperfect condition, the track out of order, or any physical defect existed which would cause an unusual jar or jerk of the train. That the engineer suddenly put on more steam power than was consistent with the safety of a passenger on the train, is to be deduced, if at all, from plaintiff's testimony about the jerk being extraordinary and his fall. But, as we have said, such incidents, unaccompanied by results more indicative of violence, are not accepted as evidence from which to conclude an accident was not caused by a jar common on freight trains. If the engineer had known plaintiff had just got aboard and was standing on a step of the caboose, he might have been remiss in care for plaintiff's safety in that situation, if the train was not handled more quietly than otherwise would have been required, because a slighter jar would imperil plaintiff than when he was in the caboose. But there is nothing to show the engineer had reason to believe plaintiff was in such a situation. The rear brakeman knew he was, but in the instant between the time plaintiff started to get on the caboose and his fall from it, the brakeman could not apprise the engineer at the other end of the train by signal or otherwise, that plaintiff was getting aboard. Plaintiff must have known these were the conditions he would have to face in getting on the caboose, as the brakeman told him its speed would not be slackened. Perusal of the following cases and others cited, *supra*, will demonstrate that no proof of negligence of the cogency required for submission to the

jury, was adduced. [Hedrick v. Railroad, 195 Mo. 104, 93 S. W. 268; Hite v. Railroad, 130 Mo. 132, 31 S. W. 32; Portuchek v. Railroad, 101 Mo. App. 52, 74 S. W. 368; Erwin v. Railroad, 94 Mo. App. 289, 68 S. W. 88.] Many cases have been cited by plaintiff's counsel and we have examined them, but find them inapt because the decisions were pronounced on facts unlike those before us. In some of them, the trainman or car man whose conduct caused the accident was regarded as culpably negligent because he knew of the perilous position of the injured party and the situation was such that he could have avoided it, either by stopping the train or car himself, or notifying the engineer or motorman to do so. [Murphy v. Railroad, 43 Mo. App. 43; Dougherty v. Railroad, 81 Mo. 325.] And in some cases the train had stopped or was stopping to let passengers off and the crew was presumed to be on the watch not to hurt them by a sudden lunge or shock. [Moorman v. Railroad, 105 Mo. App. 711, 76 S. W. 1089.] In others the shock of stopping, starting, running into a curve or colliding with another car, caused such displacements of inanimate objects or persons in secure positions as to bespeak careless operation. [Condy v. Railroad, 85 Mo. 78; Dosey v. Railroad, 83 Mo. App. 528; Fullerton v. Railroad, 84 Mo. App. 498; Bussell v. Railroad, 125 Mo. App. 441, 102 S. W. 613; Mitchell v. Railroad, 132 Mo. App. 143, 112 S. W. 291.] In no precedent determined on facts like we have here was a verdict for damages approved; whereas on facts more favorable to recovery verdicts were set aside by the courts of last resort of this State.

The judgment is reversed. All concur.

**J. P. CROCKETT, Respondent, v. ST. LOUIS & HAN-
NIBAL RAILWAY COMPANY and WABASH
RAILROAD COMPANY, Appellants.**

St. Louis Court of Appeals, February 1 and March 8, 1910.

1. **COMMON CARRIERS: Negligence: Carriage of Freight: Pleading: Joinder of Carriers.** In an action against an initial and a connecting carrier for damages sustained by negligent delay in the transportation of freight, the averments in the petition of co-partnership between the carriers might be considered as superfluous and the action treated as one seeking recovery alone on section 5222, Revised Statutes 1899, which holds the initial carrier responsible to the shipper for damage imputable to the negligence of any carrier participating in the transportation, unless the first one absolves itself from liability beyond its own route by agreeing to transport no further than its terminus; the statute in a case for negligent delay in transporting permitting two or more carriers engaged in the transportation of freight to be united as defendants, and a partnership among them or a joint undertaking by them to carry the particular freight not being essential to recovery.
2. ———: ———: ———: **Statutory Liability: How Limited.** Where in the main contracting clause of a bill of lading issued by a carrier for a shipment of freight, the carrier agrees to transport the freight from the station where it is received to destination, on the lines of a connecting carrier, the fact that subsequent clauses declare it agrees to carry to the end of its line only and there deliver to a connecting carrier would not prevent the contract from being an undertaking by the carrier for through carriage nor confine its liability for negligent losses to those occurring on its own line; but if in the main contracting clause the carrier agrees to carry the freight no further than the terminus of its line, its liability for negligent losses will be confined to such as occurred on its own line.
3. ———: ———: ———: **Joinder of Carriers: Necessity of Proving Negligence of Each.** In an action by a shipper against an initial and a connecting carrier for damages sustained by negligent delay in the transportation of freight, it becomes a condition of recovery against either carrier, under section 5222, Revised Statutes 1899, that he should adduce evidence tending to prove its negligence caused the loss.

4. ———: ———: ———: Connecting Carrier: Liability. Where, under a contract for a through shipment of freight, the initial carrier transported the freight to the end of its line and there turned it over to a connecting carrier, which in turn transported it to the end of its line and there turned it over to a third carrier, which carried it to destination, under an arrangement with the second carrier, by which a stipulated sum was paid it, the third carrier's relation to the shipment was that of agent either for both the other carriers or for the second alone, and while such third carrier was answerable to the shipper for its own torts, the other carriers were answerable for them too, or the second one was in any event.
5. ———: ———: ———: Joint Liability: Instructions: Failure to Define Terms. In an action against an initial and a common carrier for negligent injuries to freight en route, on the theory defendants were jointly liable because of a partnership agreement between them, the court instructed that, to make defendants jointly liable for negligent injuries to freight en route, they must each have been common carriers, and must have agreed to associate themselves together and form, as to the shipper, a continuous line between the point of shipment and final destination on the line of the terminal carrier, and that the contract of shipment with the initial carrier was for carriage over its own and the connecting line for an agreed sum for the whole trip, which sum was divided between the two roads. *Held*, that the words "agreed to associate themselves together" were misleading, in that they were too indefinite to prescribe a test of a partnership or joint undertaking to ship the goods; not every association between carriers for through shipment being a partnership.
6. ———: ———: ———: ———: Partnership. An agreement by common carriers to charge through rates of freight from stations on the line of one to stations on the line of the other does not make them partners, nor necessarily bind both by contracts one of them makes; but if several common carriers having each its own line associate and form what to the shipper is a continuous line, and contract to carry goods through for an agreed price, which the shipper or consignee pays in one sum and which the carriers divide among them, then as to the three parties with whom they contract, they are liable for a loss taking place on any part of the whole line.
7. ———: ———: ———: ———: ———. If two or more carriers form a co-partnership for the transportation of freight over their respective lines, a contract made by one of them with the shipper will be the contract of all, at least in the absence of a stipulation to the contrary.

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8. ———: ———: ———: ———: Agency. Though several carriers are not co-partners, one of them may be empowered to enter into through contracts with shippers for the transportation of freight in behalf of all, and in that case each will be responsible for the defaults of all.
9. ———: ———: ———: Liability of Connecting Carrier. In the absence of a statute, the final carrier having a joint traffic agreement with the initial carrier will not be responsible for the latter's negligence in transporting freight, unless the former agreed either by force of a partnership between it and the other company, or otherwise, to carry the freight over the whole route.
10. ———: ———: ———: ———. Under an agreement by the final carrier to transport from the junction to final destination, its responsibility for losses would be limited to those happening after it accepted the property to be transported.
11. ———: ———: ———: Joint Liability: Bill of Lading Construed. An initial carrier received freight for transportation to a point on the line of a connecting carrier, under a joint traffic agreement by which the freight charge was prorated between them, the initial carrier having authority to issue through bills of lading to the point of destination. The bills of lading of two of the shipments in the main contracting clause provided the initial carrier agreed to transport the property to final destination over its own line and that of a connecting carrier, but a subsequent clause provided it should only be liable for damage occurring on its own line and while the freight was in its actual custody. The bills of lading for the other shipments in the main contracting clause provided the initial company should transfer the freight to the end of its line for delivery to the connecting carrier and that in continuing the shipment the latter was the agent of the shipper and not of the initial carrier and that the initial carrier should be liable only for damage occurring on its own line. *Held*, the bills of lading did not impose joint and several liabilities on each carrier for the whole route.
12. ———: ———: ———: ———: Partnership: Constitutive Elements. The existence of a joint traffic agreement between two carriers, by which authority is given each to issue through bills of lading from points on the lines of one to points on the lines of the other, with no stipulation for a division of profits and losses, but simply one for a prorating of the freight charges, and creating no right in each company to manage the entire business transacted by both between the points of shipment and destination, or community of property interests, does not constitute a partnership.

13. ———: ———: ———: ———: ———: **Liability to Third Parties as Partners.** The facts stated would not warrant a shipper as a reasonable man to deal with such carriers as co-partners, where the bills of lading covering the shipment provided that the initial carrier should only be liable for negligent losses occurring on its own line and that the contracting carrier transported the goods as agent of the shipper.
14. ———: ———: ———: **Liability of Initial Carrier, Independent of Statute.** In the absence of a statute imposing liability, the initial carrier would be prima facie answerable for injury to freight shipped under a through bill of lading to a point on the line of a connecting carrier, but might exonerate itself by proving delivery of the freight in a reasonable time and in good order to the next carrier.

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15. ———: ———: ———: **Connecting Carriers: Liability of Last Carrier: Presumption.** The presumption that the last of several carriers which haul a consignment of freight is to blame for damage occurring in transit does not apply to a case where the negligence of the carrier is charged to have caused the damage.
16. ———: ———: ———: **Pleading: Negligence Must be Proved When Pleaded.** In an action against a carrier for loss or damage to property shipped, where plaintiff avers the loss or damage was caused by negligence, he must prove that averment in order to recover.
17. ———: ———: ———: **Connecting Carriers: Liability of Last Carrier: Presumption: Statute.** The presumption that the last of several carriers which haul a consignment of freight is to blame for damage occurring in transit does not apply in actions on section 5222, Revised Statutes 1899, when negligence is charged in the petition, as possibly it must always be under the statute, since the redress allowed by it is confined to losses caused by the negligence of the carrier.
18. ———: ———: ———: ———: **Limiting Statutory Liability of Initial Carrier: Bill of Lading Construed.** A bill of lading issued by an initial carrier which provides in the main contracting clause that the carrier shall transport the freight to the end of its own line only, for delivery there to a connecting carrier, to be transported by the latter to destination as the agent of the shipper and not of the initial carrier, and that the initial carrier shall be liable only for loss occurring on its own line, while the freight is in its actual custody, is not a contract for through shipment.
19. ———: ———: ———: ———: **Joinder of Carriers: Necessity of Proving Negligence of Initial Carrier.** In an action

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against both an initial and a connecting carrier, under section 5222, Revised Statutes 1899, as amended by Laws 1905, p. 53, for negligent delay in the transportation of freight, in order to recover against the initial carrier it is necessary to prove the loss was due to its negligence, section 2870, Revised Statutes 1899, which allows contribution among defendants in tort actions having no application; that section applying only to defendants in a tort case who have been held liable as joint tort-feasors.

Appeal from Audrain Circuit Court.—*Hon. Jas. D. Barnett*, Judge.

REVERSED AND REMANDED.

J. L. Minnis, Robertson & Robertson for appellant, the Wabash Railroad Company.

(1) The defendants are connecting carriers and not partners. Sec. 13, art. 12, Const. of Mo., sec. 5222, R. S. 1899; secs. 1122, 1132, 1134, 1138, 1139, R. S. 1899; Moore on Carriers, sec. 24, p. 491; McCann v. Eddy, 133 Mo. 59; Grain Co. v. Railroad, 176 Mo. 480; Hutchinson on Carriers, secs. 164-171; 6 Cyc. 478; Live Stock Co. v. Railroad, 87 Mo. App. 330; Shewalter v. Railroad, 84 Mo. App. 589. (2) The evidence fails to show where any delay occurred, whether on the line of the initial carrier, the intermediate carrier, or the final carrier, and having failed to establish a joint liability as against the two defendants, there can be no recovery as against the intermediate carrier, this defendant. There was no evidence whatever as to any negligent handling of the stock or handling of the cars, but the court in the instructions given as to each count submitted the question to the jury as to the negligent handling of the hogs, and the failure to exercise ordinary and reasonable care for their safety and allowed a recovery for delay and negligent handling by which some of the hogs were killed or crippled. Before the plaintiff could be entitled to recover for crippled or dead hogs, he must establish by evidence that they

were given such rough handling as to injure or kill them. *Schureman v. Railroad*, 88 Mo. App. 183. Plaintiff's instructions allow the jury to allow for the crippled and dead hogs on mere conjecture that some wrongful act was committed and all of them on that point are erroneous. *Cash v. Railroad*, 81 Mo. App. 109; *Paddock v. Railroad*, 60 Mo. App. 328. To warrant a recovery by a shipper against a common carrier for damages to live freight, it is not sufficient for the shipper to show a delivery of the live freight to the carrier in good condition and its redelivery in a damaged condition, but he must further produce evidence tending to prove an injury by human agency causing or concurring to cause the loss. *Hance v. Express Co.*, 66 Mo. App. 486.

J. D. Hostetter for appellant, St. Louis & Hannibal Railroad.

As to the shipments mentioned in the 3d and 4th counts in the petition, the initial carrier, the St. Louis & Hannibal Railroad Co., only contracted to transport the live stock to the end of its line and limited its liability to matters occurring on its own line. This it may lawfully do, as is settled by the rulings announced in the following cases, some of which are very recent ones. *Western Sash & Door Co. v. Railroad*, 177 Mo. 641; *Jones v. Railroad*, 115 Mo. App. 232; *McLendon v. Railroad*, 119 Mo. App. 128; *Bank v. Railroad*, 72 Mo. App. 82; *McCann v. Eddy*, 133 Mo. 59.

J. O. Allison and *P. H. Cullen* for respondent.

(1) This action was instituted July 28, 1905. The amendment to section 5222, R. S. 1899, was then in force. Under this act suit may be brought against all connecting carriers in any county where any one of them might be sued. It stands confessed that

the Wabash may be sued in Audrain county, hence the court had jurisdiction. R. S. 1899, sec. 5222; Session Acts 1905, p. 94. (2) A corporation has no vested right to be sued in any particular place and a change in the place where suit may be brought pertains to the remedy which the State provides for its citizens and is at all times subject to modification and control by the Legislature and the fact that the causes of action declared on in this suit, arose before the amendment of 1905 does not in any way preclude the bringing of suit in Audrain county. Cooley's Const. Lim. (6 Ed.), p. 450; Kick v. Doerste, 45 Mo. App. 134; In re Garishe, 85 Mo. 469; Schuster v. Weiss, 114 Mo. 158; Roenfeldt v. Railroad, 180 Mo. 554. (3) It is provided by our statutes that every person who shall have a cause of action against several persons may bring suit thereon jointly or severally against any of the persons liable as he may think proper. R. S. 1899, sec. 545; Hill v. Combs, 92 Mo. App. 245; Maddox v. Duncan, 143 Mo. 613; Ess v. Griffith, 128 Mo. 50. (4) Under the General Practice Act it is provided that when there are several defendants and they reside in different counties, the suit may be brought in any such county. R. S., sec. 562; Davison v. Hough, 165 Mo. 561. (5) Under section 562 the principal residing in one county and the agent residing in another may be jointly sued. Stotler v. Railroad and Wiseman, 200 Mo. 107; Lanning v. Railroad, 196 Mo. 647; Ess v. Griffith, 128 Mo. 50. Under the doctrine that the connecting carrier is agent of the initial (which is unquestionably true at least as to two counts in this case), the two companies were jointly liable and suit might be maintained against them in any county in which either the principal or agent resided. (6) The petition states a cause of action against the two companies as connecting carriers and even if it did not and a variance arose under the proof appellant cannot

complain because it failed to file an affidavit alleging variance. *Ingwerson v. Railroad*, 116 Mo. App. 139; *Litton v. Railroad*, 111 Mo. App. 140; *Hensler v. Stix*, 113 Mo. App. 162. (7) It is well settled that where several common carriers, each having its own line, associate and form what to the shipper is a continuous line, and contract to carry goods through for an agreed price which the shipper pays in one sum, and which the carriers divide among themselves, they are jointly and severally liable to the shipper with whom they have contracted for a loss taking place on any part of the whole line. *Eckles v. Railroad*, 112 Mo. App. 240; *Wyman v. Railroad*, 4 Mo. App. 35; *Barrett v. Railroad*, 9 Mo. App. 226; *Cherry v. Railroad*, 61 Mo. App. 303; *Shewalter v. Railroad*, 84 Mo. App. 589; *Live Stock Co. v. Railroad*, 87 Mo. App. 334; *Champion v. Bostwick*, 11 Wend. 571; *Champion v. Bostwick*, 18 Wend. 175; *Pattison v. Blanchard*, 1 Seld. 186; *Cobb v. Abbott*, 14 Pick. 289; *Railroad v. Spratt*, 2 Dwall. 4; *Black v. Railroad*, 139 Mass. 308; *Hart v. Railroad*, 8 N. Y. 37; *Hutchinson on Carriers* (3 Ed.), secs. 250, 251, 252, 253, 254 and 255; *Weyland v. Wilkins*, Holt N. P. 227; 1 Starkie 272; *Laughter v. Pointer*, 5 B. & C. 547; *Carter v. Peck*, 4 Sneed 203; *Cobb v. Abbot*, 14 Pick. 289; *Fromont v. Coupland*, 2 Bing. 170; *Rocky Mt. Mills v. Railroad*, 119 N. Car. 693, 25 S. E. Rep. 854, 56 Am. St. Rep. 682. (8) The rule is well established, that while a common carrier cannot be compelled to do so, it may contract to carry the goods to a point beyond the terminus of its own lines, and thus assume all of the obligations of the whole route so as to become liable for the delivery at such point, and the liability thus attached at the commencement will continue throughout the entire transit. Where it so undertakes to transport the goods throughout to destination, all connecting carriers employed in furthering and completing such transportation become agents of the initial or contracting car-

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rier, for whose defaults the initial or connecting carrier is responsible to the owner of the goods. *Ingwerson v. Railroad*, 116 Mo. App. 139; *Bank v. Some*, 119 Mo. App. 1; *Hardin v. Railroad*, 120 Mo. App. 203; *Buffington v. Railroad*, 118 Mo. App. 476; *Davis v. Railroad*, 126 Mo. 69; *Eckles v. Railroad*, 112 Mo. App. 240; *Eckles v. Railroad*, 72 Mo. App. 296; *Lesinsky v. Great Western Dispatch*, 10 Mo. App. 134; *Clothing Co. v. Merchants' Dispatch*, 106 Mo. App. 487; *Hendrix v. Railroad*, 107 Mo. App. 127; *Hutchinson on Carriers* (3 Ed.), 226-230. The shipping contracts involved in counts 1 and 2 have been construed by this court and held to be contracts for a through shipment. *Ingwerson v. Railroad*, 116 Mo. App. 139; *Bank v. Railroad*, 119 Mo. App. 1. The contracts relating to the live stock mentioned in the 3rd and 4th counts are contracts for a through shipment. *Colfax v. Railroad*, 118 Cal. 648; 40 L. R. A. 78; *Eckles v. Railroad*, 112 Mo. App. 240; *Buffington v. Railroad*, 118 Mo. App. 476; *Bushnell v. Railroad*, 118 Mo. App. 623; *Railiff Bros. v. Railroad*, 118 Mo. App. 644; *Hardin v. Railroad*, 120 Mo. App. 203; *Davis v. Railroad*, 122 Mo. App. 637; *Hutchinson on Carriers* (3 Ed.), sec. 238.

GOODE, J.—The petition was filed to the September term, 1905, of the circuit court of Audrain county, and, the brief for plaintiffs says, after the amendment of section 5222 of the Revised Statutes of 1899 took effect. Said statute makes a carrier receiving property to be carried to a point either within or without the state, or a railroad or transportation company issuing receipts or bills of lading in this State for property, liable for loss, damage or injury to the property, caused by the negligence of the receiving carrier or the railroad or transportation company issuing the bill of lading, and also for damage due to the negligence of any other common carrier, railroad or

transportation company to which the property is delivered and over whose line it passes. The amendment enacted in 1905, permitted a plaintiff suing for loss or damage to property while in transit, to unite as defendants all carriers through whose hands the property passed, and to recover in such case from the culpable defendant. Laws 1905, 54. This action is against the St. Louis & Hannibal Railway Company, the initial carrier of the property in question, and the Wabash Railroad Company, a connecting carrier. It was brought to recover the losses on four shipments of hogs, transported over the lines of the defendants, on September 11, 1903, September 20, 1904, October 11, 1904, and March 1, 1905. The petition is in four counts, declaring respectively on the separate shipments, and asking damages for losses sustained by plaintiff in consequence of delay in the transportation of each, which caused the hogs not to reach the market when they were expected to be sold and forced a sale at a lower market; also for death or injury by negligent handling during transit of twenty-nine hogs. The gravamen of each count of the petition as regards not only the delay, but the death and injury, is negligence, and the common law liability of defendants as insurers of the safe delivery of the property, is not involved. Bills of lading for the shipments were issued by the agent of the St. Louis & Hannibal Company at Perry, Missouri, where the hogs were received. The bills for the shipments on September 11, 1903, and September 20, 1904, were in the same form and purported to be between Crockett and Davidson, as owners, and the St. Louis & Hannibal Railway Company, and said parties agreed the railroad company should transport the hogs for the parties of the first part from Perry Station to the National Stock Yards, Illinois, consigning them to Zeb Steele Commission Company at the National Stock Yards, for a through rate per hundredweight, which was less than

the regular tariff rate applying to shipments not covered by the conditions and stipulations contained in the bills of lading. Besides immaterial statements, those bills recited the parties had agreed as follows:

“If the destination of the aforesaid stock be located on the line of the St. Louis & Hannibal Railway, then the St. Louis & Hannibal Railway Company agrees to deliver same at destination, after payment of proper charges by said consignee; but if the ultimate destination of said stock be located beyond the line of St. Louis & Hannibal Railway, the St. Louis & Hannibal Railway Company hereby agrees to deliver same to the next connecting carrier; and it is understood and hereby agreed that the St. Louis & Hannibal Railway Company shall be held liable under this contract only for loss or damage occurring on its own line, and while the said stock is in its actual custody, and that the duty and liability of said company shall absolutely cease and terminate upon delivery of the aforesaid stock to its next connecting line; and, when the stock is destined to any point beyond the line of its railway, said first party guarantees to protect the through rate from point of origin to ultimate destination in consideration of the covenants and agreements herein set forth.”

It was in proof the partnership between Crockett & Davidson had been settled, and the former had succeeded to the right of the firm to maintain this action. The bills of lading issued for the shipments of October 11, 1904, and March 1, 1905, were alike and constituted contracts between the St. Louis & Hannibal Railway Company and J. P. Crockett, the plaintiff, by which said company engaged to transport the carloads of hogs from Perry, Missouri, to the end of the company's railway at Gilmore, Missouri, for a special rate less than the regular tariff rate applying to shipments not covered by the conditions and stipulations con-

tained in the bills. Among other stipulations were these:

“And the said party of the first part further agrees to transport said live stock to Gilmore, Mo., station within a reasonable time, and there deliver the same to the Wabash Railroad Company for further transportation, same being consigned to Steele, Long & Pollock, at National Stock Yards, Ill.; and whereas the ultimate destination of said live stock is located beyond the terminus of the line of the St. Louis & Hannibal Railway Company, it is further understood and agreed by and between the parties to this contract that the St. Louis & Hannibal Railway Company shall only be bound and required to transport said live stock within a reasonable time to the terminus of its line, and there deliver the same to the Wabash Railroad Company for the completion of such shipment; and it is expressly understood and agreed by and between the parties hereto in the continuation of such shipment of said live stock from Gilmore, Mo., station to its ultimate destination, the said Wabash Railroad Company is and shall be held to be the agent of the party of the second part, and not the agent of the party of the first part; and it is further understood and agreed by and between the parties to this contract that the St. Louis & Hannibal Railway Company shall be held liable under this contract only for loss or damage occurring on its own line and while the said live stock is in its actual custody, and that the duty and liability of said St. Louis & Hannibal Railway Company shall absolutely cease and terminate upon the delivery of the aforesaid stock to the Wabash Railroad Company at Gilmore, Mo., station.”

Evidence was introduced by plaintiff tending to prove losses were sustained on all the shipments in consequence of unreasonable delays in transit, which prevented the stock from reaching the markets they were intended for and forced sales on lower markets;

also that negligent handling of the hogs which made up three of the shipments caused the death of some and injury of others; but there was no evidence of which company had the freight in custody when the delays and negligent handling occurred. The theory of recovery relied on is that both companies contracted with plaintiff to transport the hogs to destination; that agreements by both parties resulted either from the two being partners in the traffic business between those points, or else from the import of the contracts entered into between plaintiff and the initial carrier, the St. Louis & Hannibal Company, and the traffic arrangement in force between said company and the Wabash Company. Each count of the petition contains a paragraph like this one:

“Plaintiff further states that the defendants, at all times mentioned herein, were partners in the business of transporting stock from Perry, Missouri, to National Stock Yards, Illinois, and that each jointly used the railroad of the other for the purpose of transporting property, and that as to all shippers the line between Perry and National Stock Yards was a continuous line used, owned and operated jointly by said defendants.”

Each count also alleges the hogs were delivered to defendants (using the plural number) and defendants, in consideration of the freight charges, agreed well and safely to carry them from Perry to the National Stock Yards, Illinois, and there deliver them to the consignee, with further averments that plaintiff suffered losses because of the carelessness of defendants. Aside from the bills of lading, the only evidence relied on to prove a partnership between the two companies or a joint agreement by them to carry the stock over the entire route is the deposition of Richard E. Berger, Freight Accountant of the Wabash Company. That witness testified some of the cars containing the several shipments in controversy were thirty-four feet

long and for hauling those the rate from Perry to the National Stock Yards was \$19; the other cars were thirty-six feet long and the rate for them was \$19.75; and to those rates was added \$4 for hauling by the Merchants' Bridge Company over the Mississippi river at the terminus of the Wabash Company. He testified further as follows:

"There is no freight collected at Gilmore, and no freight collected on the west side of the Mississippi river. No freight is collected until the property is delivered at National Stock Yards, in East St. Louis. We render a bill to the Stock Yards or consignee for the entire freight, including the bridge toll. The bridge toll shows separately on these waybills. The expense bills are the property of the consignee and are rendered by the agent and do not come under my supervision. I receive reports from the agent at National Stock Yards and he reports that he collects; there would be no separation of any charges on that report. A car shipped from Perry, Missouri, to National Stock Yards that cost \$23, on that car there would simply be a charge of \$23 made. The Wabash would collect that entire \$23; it would go into the general fund of the Wabash Railroad Company.

"We have an arrangement with the Bridge Company by which we pay them \$4 per car for running over their tracks or having cars hauled over their tracks, and a further arrangement with the St. Louis & Hannibal by which we retain 35 per cent of the total freight on shipments from Perry. The Wabash keeps a set of books of account with the Bridge Company and the St. Louis & Hannibal R. R. Co., pursuant to that arrangement. At the end of each month they divide in accordance with that arrangement, the Wabash sending to the St. Louis & Hannibal its part, and sending to the Bridge Company its part, and retaining the rest. That has been in force since 1903 down to the present time.

"It is part of that arrangement, as I understand, that the Wabash carries the freight from Gilmore to its eastern terminus. The Bridge Company then carries it from the eastern terminus of the Wabash Company to the National Stock Yards, and for the entire service a lump sum is charged to the shipper. The arrangement giving 35 per cent to the Wabash and 65 per cent to the St. Louis & Hannibal is issued by the tariff department of this road and the St. Louis & Hannibal Railroad, but in just what form I could not say; it is customary to print division sheets showing what such arrangements are.

"This division of 35 per cent and 65 per cent between the Wabash and the St. Louis & Hannibal is based upon an agreement between the two roads as to the division of the income. It is a joint traffic agreement, more particularly speaking, a joint agreement between the traffic departments. The St. Louis & Hannibal has authority under that agreement to bill through to the National Stock Yards.

"Each of these bills shows on the face that the shipment is over both roads. The waybills all show information indicating that the cars were to be forwarded over the Merchants' bridge.

"Q. And under the traffic arrangement or agreement referred to the St. Louis & Hannibal, as the initial carrier, has authority from the bridge company and from the Wabash Railroad Company to bill through to the National Stock Yards and then the settlement is made in accordance with the standing agreement? A. I do not think the bridge company is consulted in a matter of this sort. My impression is that the arrangement is made between the Wabash and the St. Louis & Hannibal traffic departments and they determine among themselves what bridge or what ferry company it would be sent over. There is an arrangement between the Wabash Railroad Company and the bridge or ferry company, by which the Wabash has the right

on payment of certain compensation to send its freight over the bridge or ferry. I don't know anything about the rates being approved by the Interstate Commerce Commission."

This deposition was excluded from the evidence against the St. Louis & Hannibal Company, because the court found said company had not been notified legally it would be taken, but it was admitted against the Wabash Company. After refusing requests for directions to the jury preferred by each one of the defendants to find verdicts on each count in its favor, the court, at plaintiff's request, gave this general instruction applicable to all the counts:

"If you believe from the evidence that at all times mentioned in the petition the Wabash Railroad Company and the St. Louis & Hannibal Railroad Company were common carriers, and each had its own line of road, and if you further believe that the said railroad companies agreed to associate themselves together and formed what is to the plaintiff as a shipper of live stock, a continuous line between Perry and National Stock Yards, and if you further believe that a contract was made by the plaintiff as a shipper with the St. Louis & Hannibal Railroad Company at Perry, to carry plaintiff's stock through to the National Stock Yards over its own and the Wabash lines at an agreed sum for the whole trip, and if you believe further such agreed sum was collected by the Wabash and divided between the two roads, then as to the plaintiff as a shipper from Perry to the National Stock Yards the said roads are jointly liable for negligence causing loss on any part of the whole line between Perry and National Stock Yards."

Other instructions given at plaintiff's instance dealt with the separate shipments and the counts of the petition declaring for the separate losses sustained in each, required the jury to find as the conditions of a verdict for plaintiff, on either count, that the ship-

ments were delivered to defendants (plural) at Perry to be transported by them to the National Stock Yards for the usual freight charge; that defendants received the hogs at Perry under such agreements and undertook to ship them with the usual speed to East St. Louis, and that on account of the negligence of defendants' employees, the hogs were kept longer than the usual time and were handled negligently while on the road; reasonable and ordinary care for their safety while in transit was not exercised, and in consequence some of them were killed and others crippled. The St. Louis & Hannibal Company prayed the court to instruct unless the jury found said company was negligent in handling the live stock mentioned in the different counts, the verdict should be in its favor; and besides immaterial requests, the Wabash Company asked the court to instruct there was no evidence in the case to prove the St. Louis & Hannibal and the Wabash Company were partners in the transportation of plaintiff's stock, and no evidence of negligence on the part of the Wabash Company. Those requests were refused and exceptions saved. The jury assessed damages in plaintiff's favor on each of the counts of the petition, and judgment having been entered accordingly, defendants prosecuted this appeal.

The averments in the four counts of the petition of a co-partnership of the railway companies might be considered as superfluous and the action treated as one seeking recovery alone on the statute, which holds the initial carrier responsible to the shipper for damage imputable to the negligence of any carrier participating in the transportation, unless the first one absolves itself from liability beyond its own route by agreeing to transport no further than its terminus, as the construction put on the statute by the appellate tribunals of the state allows to be done. [R. S. 1899, sec. 5222; McCann v. Eddy, 113 Mo. 59, 33 S. W. 71; Marshall v. Railroad, 176 Mo. 480, 75 S. W.

638; *Western Sash & Door Co. v. Railroad*, 177 Mo. 641, 76 S. W. 998.] In a case for negligent damage like this is, the statute permits two or more carriers engaged in the transportation of freight, to be united as defendants; a partnership among the different carriers, or a joint undertaking by them to carry the particular freight not being essential to recovery. As regards relief on the statute in the present case, these observations are to be made: If it had been brought against the St. Louis & Hannibal Company alone, as the initial carrier, recovery would have been possible on the first and second counts, but not on the third and fourth. This is true because in the main contracting clause of the bills of lading issued for the shipments declared on in the first two counts, the St. Louis & Hannibal Company agreed to transport the freight from Perry station where it was received, to destination at the National Stock Yards, Illinois, and the subsequent clauses which declared it agreed to carry only to the end of its line and there deliver to a connecting carrier, would not prevent the contracts from being undertakings by said company for through carriage, or confine its liability for negligent losses to those occurring on its own line; whereas in the main contracting clause of the bills of lading issued for the shipments, which are the subject-matter of the third and fourth counts, the St. Louis & Hannibal Company agreed to carry the property no further than Gilmore, the terminus of its line, and, therefore, its liability for negligent losses was confined to such as occurred on its own line. Cases *supra*. But as plaintiff chose to proceed against both railway companies in a single action, it became a condition of recovery against either, that he should adduce evidence tending to prove its negligence caused the loss, as we ruled, giving reasons for so ruling, in *Blackmer & Post Pipe Co. v. Railroad*, 137 Mo. App. 479, 119 S. W. 1, 13. No evidence having been put in to show which defendant was in fault, it

follows plaintiff failed to make out a case on the statute.

The petition really counts on a partnership between the two defendants as a ground of recovery, but the instructions authorized a verdict against defendants without exacting a finding that they were partners, if the jury found certain facts which the court said would make the defendants jointly liable for damage due to negligence anywhere en route. The facts hypothesized as conditions of joint liability were these: First, at the times mentioned in the petition the two companies were common carriers, each having its own line of road; second, they had agreed to associate themselves together and had formed what was to plaintiff, as a shipper of live stock, a continuous line between Perry and the National Stock Yards; third, contracts were made by plaintiff with the St. Louis & Hannibal Company at Perry for the carriage of plaintiff's stock over its own and the Wabash line for an agreed sum for the whole trip; and, fourth, the Wabash Company had collected said sum and divided it between the two roads. The evidence showed conclusively the existence of those facts, except the agreement signified by the words "agreed to associate themselves together" and except the undertaking by the St. Louis & Hannibal Company to carry plaintiff's stock through to the National Stock Yards. Both parties were common carriers each with its own road; the two formed what was to plaintiff and was in fact, so far as the rights of these parties are concerned, a continuous line between Perry and the National Stock Yards; the entire haul was made from Perry to said yards for an agreed sum, which was collected by the Wabash Company and divided between the two roads, after paying \$4 to the Merchants' Bridge Company. It is true that from Luther on the west bank of the Mississippi river, to the National Stock Yards, the cars passed over the bridge company's line; but this is im-

material, because the Merchants' Bridge Company's relation to the shipments was that of agent either for both the companies, or for the Wabash; and though it was answerable to plaintiff for its own torts, the other companies were answerable for them, too; or the Wabash was in any event, the evidence being vague about the relation of the St. Louis & Hannibal Company to the Merchants' Bridge Company.

The words "agreed to associate themselves together" were misleading, being too vague to prescribe a test of either a partnership, or if there were no partnership, of a joint agreement by defendants to carry plaintiff's stock over the entire route. The jury were not advised for what purpose and to what extent the companies must have agreed to associate in order to make them partners, or otherwise dual contractors with plaintiff. Not every arrangement or association between carriers whose lines connect will render them partners nor make a contract of carriage entered into by one of them with a shipper the contract of both. An agreement by connecting railways to charge through rates of freight from stations on the line of one to stations on the line of the other, for the transportation of each other's cars over their respective lines, does not make the two companies partners nor necessarily bind both by contracts one of them makes. Such traffic arrangements are in force generally among railway companies, which are accustomed to receive each other's cars at junction points and fix through freight rates between various stations. The following language, or its equivalent, is found in some cases: "If several common carriers having each its own line, associate and form what to the shipper is a continuous line, and contract to carry goods through for an agreed price, which the shipper or consignee pays in one sum and which the carriers divide among them, then as to third parties with whom they contract, they are liable for a loss taking place on any part of the whole line."

[Wyman v. Railroad, 4 Mo. App. 35, 39; Shewalter v. Railroad, 84 Mo. App. 584, 587; White, etc., Co. v. Railroad, 87 Mo. App. 330, 334.] The doctrine of that excerpt, if force be allowed to all the expressions used, is sound; for it exacts not only an association among the several carriers and a continuous route composed of their separate routes, but that they, and not merely one of them, shall have contracted with a shipper to carry goods through for an agreed price. In other words, the obligation of the several companies to the shipper rests upon the contract made with him as well as upon the other facts stated. Of course, if two or more carriers have formed a co-partnership for the transportation of freight over their respective lines, then the contract made by one of them with the shipper will be the contract of all; at least in the absence of a stipulation to the contrary. And if several carriers are not a co-partnership, one of them may be empowered to enter into through contracts with the shippers in behalf of all and each will be responsible for the defaults of all. In any action by a shipper against different carriers which have handled his property between the starting point and destination, when the question is, which is responsible for a loss or injury to the property while in transit, the terms of the bill of lading, which is the contract for carriage, must be scrutinized. The main instruction in this action made both companies liable for losses due to the fault of either, if the jury found certain undisputed facts and further found the two companies had agreed to associate themselves together and form what was to plaintiff a continuous line. But the bills of lading expressly exempted the St. Louis & Hannibal Company from responsibility after it had turned the freight over to the connecting carrier, namely, the Wabash Company, without, however, expressly exempting the latter company from responsibility for losses occurring in transit but not while the stock was in its charge. But

apart from the statute on which, as we have shown, the verdict cannot stand, the Wabash Company was not responsible for the negligence of the St. Louis & Hannibal Company unless the former company agreed, either by force of a partnership between it and the other company, or otherwise, to carry the stock over the whole route. Whether it agreed otherwise than constructively as a partner with the St. Louis & Hannibal Company, which signed the contracts for carriage, must be ascertained from the terms of said contracts, to-wit, the bills of lading, whose relevant parts we have quoted, and from the acceptance of the freight by the Wabash at the junction point, and the testimony of the witness Berger, there being no other evidence relevant to the inquiry. Two of the bills of lading said the St. Louis & Hannibal Company agreed to transport the property to destination over its own line and the lines of connecting carriers, and in the other two, said it agreed to transport to Gilmore, the terminus of its line, and there deliver the property to the Wabash Company to complete the carriage. The only agreement on the part of the Wabash to be deduced from its receipt at Gilmore of the stock shipped under those instruments, is an agreement to haul the property from the junction to destination; and by this agreement its responsibility for losses would be limited to those happening after it accepted the property. [Halliday v. Railroad, 74 Mo. 159.] In the cited case the Supreme Court said if a carrier undertook to transport beyond the end of its line, it would be responsible according to the terms of the contract of shipment, if it contained no exemption from loss or injury occurring on the connecting lines as well as its own, *and a connecting carrier would be responsible to the shipper for its own fault or negligence according to the terms of the shipper's contract with the contracting carrier.* In McLendon v. Railroad, 119 Mo. App. 128, 95 S. W. 943, it appeared the freight had been delivered to the

West Shore Railroad Company at New York for transportation to Kansas City, Missouri, under a contract made with said company, which agreed to carry only to the end of its line and declined to be liable for damage occurring elsewhere. The plaintiff recovered against both defendants in the court below in an action not based on the statute cited *supra*, and the judgment was reversed in the court of appeals because the contract of shipment destroyed the theory of plaintiff's case, which was that the two lines had "formed themselves into a single and through line of transportation, and in that capacity the West Shore Company received the freight and the Wabash Company completed the carriage and delivered it to the plaintiff." The court further said the two companies and the plaintiff had the right to contract as they pleased when uncontrolled by statute or public policy, no matter what arrangement may have existed between the companies themselves. That decision was given on a contract of shipment like those before us and is in point against the proposition that such a contract imposes a joint and several liability on each carrier for the whole route; which is the same as to say the contract of shipment is not a joint undertaking by both carriers for the entire distance, for then both would be responsible for what happened anywhere in the transit. It is true the witness Berger testified the St. Louis & Hannibal Company had authority under the agreement between the two companies, "to bill through to the National Stock Yards." This is far from saying it had authority to issue bills of lading binding the Wabash as a carrier over the whole route; and, moreover, if it had such authority, it was not exercised in the contracts with plaintiff.

The only theory of dual liability left is that of co-partnership between the two defendants which made the contracts entered into by the plaintiff with the St.

Louis & Hannibal Company, obligations of both companies. The circumstances mentioned in the main instruction for plaintiff were not submitted to the jury as proof, if found to have existed, of a partnership, but of joint contracts between defendants and plaintiff, and the theory of partnership is not much insisted on by plaintiff's counsel. In themselves these facts would not constitute a partnership between the defendants, because they lack the chief elements of partnership, such as a division of profits and expenses, or a right in each company to manage the entire business transacted by both between the points of shipment and destination, or community of property interests. [Campbell v. Dent, 54 Mo. 325; Musser v. Brink, 68 Mo. 242; Ashby v. Shaw, 82 Mo. 76.] Neither would those circumstances warrant plaintiff, as a reasonable man, to deal with the two companies as partners, in view of the bills of lading accepted by him, which, instead of holding them out as partners, excluded the notion of joint liability. When we look beyond the instructions to the evidence, we find nothing which tended to establish a partnership or to induce plaintiff or the public to believe in one. The existence of a joint traffic agreement between the traffic departments of the two companies, and authority in the St. Louis & Hannibal Company to issue through bills of lading from Perry to the National Stock Yards, with no stipulation for a division of profits and losses, but simply one for a prorating of the freight charges, does not constitute a partnership according to the great weight of decision. [Insurance Co. v. Railroad, 104 U. S. 146; Penn., etc., R. R. v. Jones, 155 U. S. 333; Insurance Co. v. Kuntz Line, 4 Woods (U. S. C. C.) 268; Deming v. Railroad, 21 Fed. 25; Gas v. Id., 99 Mass. 220; Burrows v. Is., 100 Mass 26; Aigin v. Id., 132 Mass. 423; Converse v. Transp. Co., 33 Conn. 166; Wayman v. Railroad, 58 Minn. 22; Watkins v. Id., 8 Mo. App. 569; Railroad v. Waters, 50 Neb. 592; Mont-

gomery, etc., *R. R. v. Moore*, 51 Ala. 394; Note to *Wells v. Thomas*, 72 Am. Dec. 238; *Irvin v. Railroad*, 92 Ill. 103; *Hot Springs R. R. v. Trippe*, 42 Ark. 465; *Knott v. Railroad*, 98 N. C. 73, 2 Am. St. Rep. 321; *Ft. Worth, etc., R. R. v. Johnson*, 5 Tex. Civ. App. 24, 23 S. W. 827.] A few cases look opposed to this doctrine, but in most, or all of them, the agreement between the carriers will be found, on critical examination, to contain either the essential elements of partnership, such as a pooling of the earnings and division of expenses and profits, or else there will be found some distinct ground of liability on the part of the carrier sued, arising from the nature of the bill of lading and showing it was the joint obligation for the entire route of the several carriers which handled the shipment. Where two or more companies had formed an association for the transportation of persons or property under a name which was not that of either of the companies, and in the name of the association had contracted with a shipper to carry his freight from the point of reception to destination, they were treated as partners. [*Block v. Railroad*, 139 Mass. 308; *Rice v. Railroad*, 3 Mo. App. 27.] In the cases next cited, a partnership was found to exist in the arrangements entered into by two or more carriers for through transportation over connecting routes, because a division of profits, not merely a pro-rating of gross receipts, was required, as well as other elements of partnership. [*Champion v. Bostwick*, 18 Wend. 675, 31 Am. Dec. 376; *Barrett v. Railroad*, 9 Mo. App. 226.] And in the following cases the courts held the defendant liable on the special terms of the bills of lading. [*Hart v. Railroad*, 8 N. Y. 37; *Bradford v. Railroad*, 7 Rich. L. (S. C.) 201, 62 Am. Dec. 411.] See, too, on these questions, 4 Elliott, Railways, secs. 1446, *et seq.*; 1 Hutchinson, Carriers (M. & D. Ed.), secs. 249, 264, incl. In the case at bar we have examined the contracts of shipment and find there is nothing in them to indicate

either a partnership or otherwise a joint undertaking on the part of the two defendants. It follows from what has been said no liability was shown on the part of the Wabash Company in consequence of its having contracted with plaintiff for the entire route, either as partner of the St. Louis & Hannibal or according to the meaning of the bills of lading. We may say further there was no evidence tending to establish a partnership as against the St. Louis & Hannibal Company because the deposition offered for the purpose was held inadmissible as to said defendant.

As to the liability, independent of the statute, of the St. Louis & Hannibal Company for losses on the two shipments for which it issued through bills of lading, it is enough to say the petition does not seek recovery on that ground, as the joinder of the Wabash Company shows. Without the statute the first company would be *prima facie* answerable for those shipments; but might exonerate itself by proving delivery of the stock in a reasonable time, and in good order to the next carrier (*Snider v. Express Co.*, 63 Mo. 376), a defense against negligent losses which the statute does not tolerate from an initial carrier if it receives freight for through shipment over other lines than his own.

The judgment is reversed and the cause remanded. All concur.

ON MOTION FOR REHEARING.

GOODE, J.—A motion for rehearing has been filed in this case supported by an elaborate brief, contending the rules of law declared in the opinion are contrary to the decided cases and of disastrous tendency. The propositions of law the opinion is said to contravene will be stated in their order. First, it is contended there is a presumption the last of several carriers which hauls a consignment of freight—in this

case the Wabash Company—is to blame for damage occurring in transit, and as enforcing this presumption we are cited to *Crouch v. Railroad*, 42 Mo. App. 252; *Jones v. Railroad*, 115 Mo. App. 235, 91 S. W. 158; *Hurst v. Railroad*, 117 Mo. App. 38, 94 S. W. 794; *Connelly v. Railroad*, 133 Mo. App. 310, 133 S. W. 233. Said presumption does not apply to a case like the present, where the negligence of the carrier is charged to have caused the damage. We so ruled in *Hurst v. Railroad*, *supra*, and the other cases cited were based on the failure to perform contracts to deliver the freight at destination and not on tortious management. That a plaintiff who avers loss or damage to his property while in shipment was caused by negligence, must prove the averment, has been decided repeatedly in this State and the decisions are reviewed in *Standard Mill Co. v. Transit Co.*, 122 Mo. 258, 275, 26 S. W. 704.

The second proposition adduced in the brief on motion for rehearing is that the presumption against the final carrier obtains in an action on section 5222 of the statutes (1899) as amended in 1905, and we are charged with erroneously holding the amendment did away with the presumption. Our answer is the presumption never applied to actions on the statute when negligence was charged in the petition, as possibly it must always be; since the redress allowed by the statute is confined to losses caused by the negligence of a carrier.

The third contention is we erred in holding the bills of lading for shipments declared on in the third and fourth counts of the petition were not contracts for through shipment. Those bills of lading were so drawn as to bring them within express decisions of the Supreme Court of Missouri, as interpreted by the Supreme Court of the United States, as to what constitutes a contract by the initial carrier simply to transport to the end of its own line. [*Railroad v. Mc-*

Cann, 174 U. S. 580; *Western Sash & Door Co. v. Railroad*, 177 Mo. 641, 76 S. W. 998.] In *Blackmer, etc., Co. v. Railroad*, 137 Mo. App. 479, 504, 119 S. W. 13, we intimated doubt about the soundness of this construction of section 5222, which the writer thinks was enacted to hold the initial carrier answerable if the goods were received for carriage to a point beyond its own line, no matter in what form the bill of lading was issued. The construction began with *Dimmitt v. Railroad*, 103 Mo. 433, 15 S. W. 761, was retained in a modified form in *McCann v. Eddy*, 133 Mo. 59, 33 S. W. 71, and, right or wrong, is beyond the power of this court to alter.

Fourthly, it is contended in the motion for rehearing that where goods are hauled from the point of shipment to destination by several carriers and losses occur in transit, the shipper may recover from the initial carrier in an action in which all are joined as defendants, without introducing evidence to prove the loss was due to the negligence of the first carrier; that the amendment to the statute did not impose on the shipper the burden of proving the loss was due to the first carrier's negligence in order to hold it responsible. In support of this proposition we are pointed to section 2870, R. S. 1899, which allows contribution among judgment defendants in an action for tort, to the same extent as such defendants in an action founded on contract may have contribution. It is said if the first carrier is held responsible to the shipper without proof the loss was due to his negligence, section 2870 affords a remedy over against the carrier which was to blame; therefore it is argued the court reasoned unsoundly in *Blackmer, etc., v. Railroad*, that if the first carrier is held answerable in an action wherein it is joined with others, without proof the loss was due to its fault, it would be deprived of a remedy against the carrier in fault. What application section 2870 has to the point we fail to perceive. Said

section only allows contribution among defendants in a tort case who have been held liable as joint tortfeasors. The redress contemplated in section 5222, before it was amended, was that if the initial carrier was held liable, when innocent, and hence not a joint-tortfeasor, it could recover against the carrier who was in fault. The one statute contemplates contribution among two or more wrongdoers, and the other contemplates indemnity to an innocent carrier which has been held responsible for a loss. As said in the Blackmer-Post Pipe Company case, the amendment was, perhaps, so framed as to frustrate, in some measure, the policy of the statute, but we still think its language is such as to preclude any other interpretation than the one given to it in said case. It should be borne in mind the shipper may still confine his action to the initial carrier and get all the redress the statute afforded prior to the amendment; but if he chooses to unite several carriers in the action, he must do so *cum onere*; that is, take on himself the burden of proof imposed by the amendment.

The motion for rehearing is overruled. All concur.

FRANK VOSS, Respondent, v. WILLIAM BOLZENIUS et al., Appellants.

St. Louis Court of Appeals. Submitted on Briefs February 10, 1910.
Opinion filed March 8, 1910.

1. **TRIAL PRACTICE: Demurrer to Evidence: Properly Overruled, When.** Where there is evidence sustaining the charge set out in plaintiff's statement, a demurrer to the evidence is properly overruled.
2. **DAMAGES: Pain of Mind: Malice and Insult: Pleading.** Plaintiff's statement, in an action commenced in a justice's court, alleging that defendants intentionally and maliciously disturbed the peace of plaintiff by loud and unusual noises and

by cursing and abusing plaintiff and that plaintiff lost much sleep and rest and suffered great mental pain and anguish and was disgraced and humiliated by the acts of defendant, was sufficient, as against the objection that pain of mind unless connected with bodily injury is not the subject of damages, since the case alleged by the pleading is one of tort accompanied by circumstances tending to show malice and insult, the effect of which was loss of sleep and nervous shock.

Appeal from Franklin Circuit Court.—*Hon. R. S. Ryors*, Judge.

AFFIRMED.

Jesse M. Owen and *Jesse H. Schaper* for appellants.

(1) There was no substantial evidence produced at the trial to warrant the trial court in submitting the case to the jury; the court, therefore, erred in refusing the demurrer offered by defendants at the close of all the evidence. *Hickey v. Welch*, 91 Mo. App. 4. (2) The trial court committed error in giving to the jury instruction number 1, asked by plaintiff, for the following reasons. (a) Because there was no substantial evidence in the case on which to base it. (b) Because it submitted to the jury the legal propositions on which plaintiff's right to recover hinged, which should have been decided by the court. *Carroll v. Campbell*, 110 Mo. 557. (c) Because it leaves to the jury to determine under what circumstances plaintiff is entitled to exemplary damages instead of informing the jury what facts render defendants liable for such damages. *Clark v. Fairly*, 30 Mo. App. 335. (d) Because this is not so framed as to leave the jury free to exercise their discretion whether to allow punitive damages, and the vice of it is that it withdraws such discretion and makes the allowance mandatory. *Johnson v. Wells*, 112 Mo. 561; *Nicholson v. Rogers*, 129 Mo. 141; (e) Because it fails to define the terms "wantonly and maliciously."

James Booth for respondent.

(1) Respondent insists now that the testimony of plaintiff as to the effect of defendants' wrongful actions, is untrue—that as a matter of fact, he did not lose any sleep and rest, and that expert evidence ought to have been called to support this phase of the case. Plaintiff so testified, and it was for the jury and the trial court to determine the credibility of his evidence. *Levels v. Railroad*, 196 Mo. 606; *Shoe Co. v. Sally*, 114 Mo. App. 222; *Dowling v. Wheeler*, 117 Mo. App. 169.

(2) It is charged by appellants, that the demurrer ought to have been sustained, because the acts of defendants resulted in no physical injury to respondent. In reply to this charge, it is elementary that as to the parties to this controversy, this cause is to be tried and determined upon the same theory here as below. *Atterbury v. Hopkins*, 122 Mo. App. 172. (3) Plaintiff's instruction No. 1 is not subject to any of the objections leveled against it by appellant. If the facts therein submitted were found by the jury then it was a proper case for punitive damages. This is not like a case where punitive damages were left to assessment by the jury in an action, where the facts justifying such damages were not submitted to the jury. Here the instruction did submit the essential facts. The jury must have found that defendants' acts were intentional, wanton and malicious. This was all necessary to entitle plaintiff to punitive damages. *Lampert v. Drug Co.*, 119 Mo. App. 693; *Johnson v. Wells*, 112 Mo. App. 557.

(4) Independent of all question of waiver and theory on which appellants tried their case below, the issue they now present is this: Will an action lie where there is no physical injury, which results in the loss of health, rest, sleep or mental anguish. *Shellabarger v. Morris*, 115 Mo. App. 566; *Medford v. Levy*, 13 Am. St. Rep. 887; *Trigg v. Railroad*, 74 Mo. 147; *Deming v. Railroad*, 80 Mo. App. 152; *Carter v. Osteen*, 112

S. W. 995; Randolph v. Railroad, 18 Mo. App. 609; Beck v. Railroad, 108 S. W. 133; Smith v. Railroad, 122 Mo. App. 85; 2 Waterman on Trespass, p. 86, sec. 698.

REYNOLDS, P. J.—The plaintiff commenced his action before a justice of the peace, where he recovered. On an appeal by the defendants to the circuit court, a trial *de novo* was had on an amended statement, to the effect that the defendants “intentionally, wantonly and maliciously disturbed the peace of plaintiff by loud and unusual noises and by cursing and abusing plaintiff . . . and by threatening to assault plaintiff, and that by reason thereof plaintiff lost much sleep and rest, suffered great mental pain and anguish and was disgraced and humiliated by said acts of defendants,” for which he claimed twenty-five dollars actual and one hundred dollars exemplary or punitive damages and costs. The statement also set out the insulting and abusive language addressed by defendants to plaintiff which it is unnecessary here to repeat, beyond noticing that it was not only insulting and abusive, but vulgar.

At the trial before a court and jury, evidence was given on the part of plaintiff to the effect that defendants, who are all boys under 21 years of age and were represented by a guardian *ad litem* duly appointed by the court, in driving past plaintiff’s residence in Franklin county, had cursed and abused plaintiff and that their language was insulting and threatening, and that in consequence of it he had not only been humiliated and suffered great worry, amounting to rather grave nervous breakdown, followed by loss of sleep the night after the occurrence. The insulting language was uttered in the presence of several persons, members of the family of plaintiff. On the part of defendants the testimony tended to negative the use of the language as applied to plaintiff and was to the

effect that defendants were not directing their talk or epithets to or at him but were calling to some companions, whom they expected to meet. Practically, that was the defense.

At the close of the testimony defendants asked for an instruction that under the pleadings and evidence plaintiff was not entitled to recover. This was refused and defendants excepted. At the instance of the plaintiff the court instructed the jury to the effect that if they believed from the evidence that the defendants, on the day named and in the county of Franklin, "intentionally, wantonly and maliciously disturbed the the peace of plaintiff by loud and unusual noises, and by cursing and abusing plaintiff and calling him . . . and that by reason thereof plaintiff lost any sleep and rest, and suffered any mental pain and anguish, and was disgraced or humiliated by the said acts of defendants, then you will find the said issues for the plaintiff," and assess his damages at what they believed would fairly and reasonably compensate him for the injuries received, if any, not exceeding the sum of twenty-five dollars, and in addition to such sum might assess punitive or exemplary damages both as a punishment to defendants and as a warning to others, not exceeding one hundred dollars, the jury being directed to assess the damages separately if they found for plaintiff. This was excepted to. The jury returned a verdict for plaintiff, assessing his damages at one dollar actual and twenty dollars punitive damages. Judgment followed, a motion for a new trial as well as one in arrest was filed, overruled, exception saved to the action of the court and the case is here on appeal of defendants.

The assignments of error are that there was no substantial evidence produced at the trial to warrant the trial court in submitting the case to the jury, and that the court erred in refusing the demurrer offered at the close of the evidence; that the court erred in

giving to the jury the instruction it gave at the instance of plaintiff, as there was no substantial evidence in the case on which to base it, and that it submitted legal propositions on which the plaintiff's right to recover hinged which the court should have decided, leaving to the jury to determine under what circumstances plaintiff is entitled to exemplary damages; because the instruction is not so framed as to leave the jury free to exercise their discretion whether to allow punitive damages, its vice consisting in the fact that, in withdrawing such discretion, it makes the instruction mandatory, and it is defective in that it fails to define the terms "wantonly and maliciously." And the final assignment is that the trial court erred in overruling defendant's motion for new trial and in arrest.

Taking these up in their order, we hold that the demurrer to the evidence was properly overruled. There was evidence sustaining the charge set out in the statement. Whether that statement sets out a cause of action is a more serious question, involving the right to recover damages for mental pain and anguish, unaccompanied by injury to person or property. The averment in the statement that one of the consequences of the act of the defendants was the loss of sleep which was embodied for the first time in the amended statement, as we understand counsel for defendants, is the main averment that is relied on for bringing the case out of the general rule that pain of mind, unless connected with bodily injury, is not the subject of damages, and this counsel argue is not sufficient for the purpose and was not proven. In the case in which this general rule was announced by our Supreme Court, that of *Trigg v. Railway*, 74 Mo. 147, it is said at page 153 of 74 Mo. (41 Am. Rep. 305), that pain of mind must be connected with bodily injury, "unless the injury is accompanied by circumstances of malice, insult or inhumanity." The *Trigg Case* has been recognized as a correct statement of the law in this State

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ever since its announcement, and the exception to the general rule then announced and often referred to. See *Shellabarger v. Morris*, 115 Mo. App. 566, 91 S. W. 1005; *Hickey v. Welch*, 91 Mo. App. 4; *Deming v. Railroad*, 80 Mo. App. 152; *Connell v. The Western Union Tel. Co.*, 116 Mo. 34, 22 S. W. 345; *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995. The case here made is one of gross insult, the effect of which was loss of sleep and nervous shock.

It is a case of tort accompanied by circumstances tending to show malice and insult. It is clearly within the law announced in *Smith v. Atchison, T. & S. F. R. Co.*, 122 Mo. App. 85, 97 S. W. 1007. The court by the instruction given at the instance of plaintiff required these elements to be found as a condition of a verdict for plaintiff.

On the authority of the cases cited we think that the amended statement sets out a cause of action and that the instruction given at the instance of the plaintiff is not subject to the objection assigned. The judgment of the circuit court is affirmed. All concur.

SAM BRANDON, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

**St. Louis Court of Appeals. Submitted on Briefs February 9, 1910.
Opinion filed March 8, 1910.**

1. **RAILROADS: Killing Animals: Fencing: Feasibility of, a Question of Fact.** In an action against a railroad company for double damages for killing cattle the question whether the ground at the point where the cattle went upon the track could or could not be fenced is a question of fact.
2. **APPELLATE PRACTICE: Finding by Trial Court Conclusive.** The finding by the trial court on a question of fact is conclusive on appeal, except where there is no evidence to sustain it.

Appeal from New Madrid Circuit Court.—*Hon. Henry C. Riley*, Judge.

AFFIRMED.

W. F. Evans and *Moses Whybark* for appellant.

The court erred in overruling the demurrer to the evidence offered by the defendant at the close of the plaintiff's case. *Smith v. Railroad*, 111 Mo. App. 410; *Foster v. Railroad*, 112 Mo. App. 72; *McGuire v. Railroad*, 113 Mo. App. 79; *Acord v. Railroad*, 113 Mo. App. 84; *Welch v. Railroad*, 131 Mo. App. 464. (a) It is the well-settled law in this State that railroad companies are not required to fence at their depots or stations such portion of the road as it is necessary to keep open for the transaction of business with the public, and the reception and discharge of freight and passengers. *Acord v. Railroad*, 113 Mo. App. 94 and cases cited. (b) The testimony of the plaintiff's own witness, Meatte, was to the effect that the spur or switch track at Brinkerhoff was used by everybody who wanted to ship; that freight was loaded and unloaded there, and placed in a small house near the track which was used as a freight house; that local freight trains stopped there, and that two passenger trains stopped there daily, one north-bound and one south-bound. This testimony clearly showed a willingness on the part of the railroad company to do business at this point with the general public, and the public accepted such invitation and did business there. The maintenance of a depot at Brinkerhoff was not indispensable to constitute it a "station." *Foster v. Railroad*, 112 Mo. App. 72; *Acord v. Railroad*, 113 Mo. App. 102; *Welch v. Railroad*, 131 Mo. App. 469.

J. V. Conran for respondent.

REYNOLDS, P. J.—Action for damages for killing cattle at a point in Pemiscot county, it being averred in the petition that the animals “strayed upon the track and grounds occupied by the railroad of defendant at a point where it passes through, along or adjoining inclosed and cultivated fields or uninclosed lands, and where the defendant was by law required to erect and maintain good and lawful fences with sufficient cattle-guards and at a point not within the switch limits of any station, not at a public road crossing, nor within the limits of any incorporated city, town or village.”

The evidence on the part of plaintiff—noticing only that part of it which relates to the local situation—was to the effect that the animals were killed at a flag station named Brinkerhoff—a station at which there is a small house for storing freight and at which two local daily freight and passenger trains stopped, through trains stopping on signal. No agent was stationed there, no tickets sold.

The railroad track runs north and south there. There are cattle-guards north and south of this freight house and between them and south of the freight house a switch or spur track takes off from the main track and to the east of it. The south cattle-guard is about 577 feet south of the switchstand, and the north about 344 feet north of it. The freight house is said to be almost 100 or 150 feet north of the switchstand. The space between the main track and the switch appears to have been used for piling ties. To the west of the track between the cattle-guards appears to be open woodlands. On the east of the main track and between it and the switch track is a water hole. The cattle came from the west, crossing the main track to this water hole, and were drinking there, when an engine drawing a passenger train, coming from the south and when about 500 feet from where the cattle were, whistled, and when the cattle started back from the east of

the track to cross over to the west they were hit and the three sued for killed. There is no fence along either side of the track at this point. No fence for about 307 yards between the cattle-guards. It is open woods between those points. The cattle went on the track from the west, coming out of the woods, at a point about 100 or 150 feet south of the head of the switch, crossed over the track to the water and then started back over the track. The switch is about 300 or 400 feet long and is used for everybody to ship who wants to do so; is used for accommodation of every one who desires to ship ties. All the space between the switch and the main track where the animals went on the right of way is used for piling ties; nothing there but ties at the time, about 5000 of them piled to the east of the main track, between it and the switch.

The only evidence on the part of the defendant was a plat, identified as a correct plat of the *locus in quo*. We omit the testimony as to value, ownership, etc., as not material here.

At the conclusion of the testimony defendant demurred, which demurrer the court overruled, and sitting as a jury, a jury having been waived, found for plaintiff, assessing the value of the cattle killed at seventy dollars and on motion of plaintiff entered judgment for double this assessed value.

No instructions or declarations of law were asked or given—other than that of defendant in the nature of a demurrer. In due time defendant filed its motion for a new trial, and that being overruled, perfected an appeal to this court, saving exception to the adverse ruling of the court.

The error assigned is to the action of the court in overruling the demurrer, it being contended that it is the well-settled law of this State that railroad companies are not required to fence at depots or stations such portions of their roads as it is necessary to keep open for the transaction of business with the public

and the receipt and discharge of freight, and that the testimony of plaintiff's own witnesses was to the effect that the spur or switch track was used by everybody who wanted to ship; that the evidence showed that the defendant was willing to do business with the public at that point and that the public had accepted the invitation of the defendant. Cases relied on are *Smith v. Railroad*, 111 Mo. 410, 85 S. W. 972; *Foster v. Railroad*, 112 Mo. App. 67, 1. c. 72, 87 S. W. 57; *McGuire v. Railroad*, 113 Mo. App. 79, 87 S. W. 564; *Acord v. Railroad*, 113 Mo. App. 84, 87 S. W. 537; and *Welch v. Railroad*, 131 Mo. App. 464, 109 S. W. 1074. We have examined all these cases and have a right to assume that they were all called to the attention of the learned trial judge. In all of these cases, the question of whether the ground at this point and the place at which the cattle went upon the track could or could not be fenced, are held to be questions of fact, the finding on which by the trial court is conclusive on the appellate court save in the absence of any probative evidence to sustain it. According to the plat produced by defendant and in evidence, and according to the oral testimony, there was space of from 100 to 150 feet between the freight house and the point where the spur track leaves the main track. The unfenced and unguarded switch and station space between cattle-guards and fence was 921 feet, 307 yards. It would seem that the trial judge found this too much to allow for switching limits and that there was ample space to have allowed cattle-guards south of the freight house, between it and the spur stand, and to have permitted them without interference with the safe and convenient loading and switching of cars or endangering the lives of the railroad men. With the evidence as to the local situation before him, and with the law in mind, we must assume, in the absence of declarations or instructions asked or given, that the finding of the

learned trial judge is correct and that the so-called switching limits were unnecessarily long. Granting full faith and credit to that finding, supported as it is by evidence, the judgment must be and it is affirmed. All concur.

J. W. McCLANAHAN, Admr. of the Estate of FLOR-
ENCE WHITWORTH, Deceased, Respondent, v.
ST. LOUIS & SAN FRANCISCO RAILROAD
COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted February 8, 1910.
Opinion filed March 8, 1910.

1. **CARRIERS OF PASSENGERS: Injury to Passenger: Defect in Platform.** A railroad company is required to keep a platform at a station on which it invites passengers to board and alight from its cars in good condition, and is responsible for an accident to a passenger boarding or alighting from its cars by reason of a defect in such a platform.
2. **EVIDENCE: Personal Injury: Fractured Bone: Hypothetical Question.** In an action for personal injuries, where a claim was made that one of plaintiff's femur bones was fractured and expert witnesses for defendant had testified it would be impossible for a person who had a fractured femur to walk, testimony by said experts, in answer to a hypothetical question propounded by counsel for plaintiff, that assuming there was only a partial fracture at the time of the accident, it might have been possible for plaintiff to have walked, was properly admitted, as plaintiff was entitled to have her theory of the case presented by expert testimony.
3. **CARRIERS OF PASSENGERS: Injury to Passenger: Instructions: Physical Facts.** In an action against a railroad company for personal injuries alleged to have been received by plaintiff's falling into a hole at a station platform, one of the issues was, whether or not one of plaintiff's femur bones was fractured. The uncontradicted evidence showed that after the accident she was about on her feet until the next morning and expert witnesses testified it would have been impossible for her to have done this, if her femur was fractured. *Held,*

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the refusal to give a cautionary instruction to the effect that if the jury believed the statements made by plaintiff that her injury was received by falling into a hole was contrary to the physical facts of the same evidence, her statements with reference to her injury should be disregarded, was reversible error.

4. ———: ———: Proximate Cause: Burden of Proof. In an action for injuries from a defect in a station platform received by one alighting from a train, the burden is on plaintiff to show that the injury is directly traceable to the accident.
5. WITNESSES: Failure to Produce: Presumption. In an action for personal injuries, the failure of plaintiff to produce as witnesses the physicians whom she employed to attend her and a young man who was a member of the household and who was in the house when plaintiff came home immediately after the accident, was a strong circumstance against her.
6. CARRIERS OF PASSENGES: Injury to Passenger: Cause of Injury: Evidence Held Lacking. In an action for injuries to one alighting from a train from falling into a hole in a station platform, *held*, there was a lack of evidence to show the injury was solely and directly traceable to the accident alleged.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

REVERSED AND REMANDED.

W. F. Evans and *Moses Whybark* for appellant.

(1) The court in overruling the defendant's motion for a new trial. The verdict under the pleadings was so manifestly against the evidence that it ought to have been set aside. *Spiro v. St. Louis Transit Co.*, 102 Mo. App. 250; *Friesz v. Fallon*, 24 Mo. App. 439; *Kennedy v. Transit Co.*, 103 Mo. App. 1; *Spohn v. Railroad*, 87 Mo. 74; *Bank v. Railroad*, 98 Mo. App. 330. The verdict was a bare conjecture, and not supported by the facts. *Demaet v. Storage & Packing Co.*, 121 Mo. App. 92; *Weltmer v. Bishop*, 171 Mo. 116; *Champagne v. Hamey*, 189 Mo. 709; *Phippin v. Railroad*, 196 Mo. 321. (2) The testimony of plaintiff was that three physicians, Phipps, Mayes and Crow,

attended her just after her injury, and yet not one of them was introduced nor their absence accounted for, nor any reason assigned for the failure, but she relied exclusively on the testimony of Drs. Hendrix, Byers and Faris, who made the examination of plaintiff under the order of the court, long after she claims she was injured. *Smart v. Kansas City*, 91 Mo. App. 586; *Lynch v. Railroad*, 208 Mo. 1; *Reyburn v. Railroad*, 187 Mo. 565, 16 Cyc. 1062; 22 Am. and Eng. Ency. Law (2 Ed.), 1261; 11 Am. and Eng. Ency. Law (2 Ed.), 503, par. 2; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 36 C. C. A. 152; *Railroad v. Ellis*, C. C. A. 454. These physicians were not accessible to the defendant; they were incompetent to testify on behalf of the defendant, but were competent for plaintiff. R. S. 1899, sec. 4659; *Diel v. Railroad*, 37 Mo. App. 454; *Kerstner v. Vorweg*, 130 Mo. 196; *Bank v. Worthington*, 145 Mo. 103; *Standard Oil Co. v. State (Tenn.)*, 10 L. R. A. (N. S.) 1015. And in a case like this the rule requires the plaintiff to call the physician who examined her shortly after the accident to testify as to the extent of her injuries. *Smart v. Kansas City*, 91 Mo. App. 586; 22 Am. and Eng. Ency. Law (2 Ed.), p. 1261, par. c. (3) The testimony of the plaintiff as to extent of injuries she received, and her subsequent conduct on the same evening, is so irreconcilable with the theory that she broke her hip bone by falling into the platform hole as not to warrant the submission of the case to the jury; saying nothing of the testimony of the large number of witnesses who saw her that evening walking around her house, and elsewhere. *Oglesby v. Railroad*, 177 Mo. 272; *Weltmer v. Bishop*, 171 Mo. 116; *Spiro v. Transit Co.*, 102 Mo. App. 250; *Demaet v. Storage & Packing Co.*, 121 Mo. App. 104; *Smart v. Kansas City*, 91 Mo. App. 586; *Zalotuchin v. Railroad*, 127 Mo. App. 577; *Hook v. Railroad*, 162 Mo. 569; *Champagne v. Hamey*, 189 Mo. 726. (4) The appellate courts will not accept

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as true the testimony of a witness, although the trial court has, when the testimony is opposed to reason and physical law. *Reed v. Railroad*, 112 Mo. App. 575; *Stafford v. Adams*, 113 Mo. App. 717; *Friesz v. Fallon*, 24 Mo. App. 439; 1 *Elliott on Evidence*, sec. 39, pp. 37-40; 4 *Elliott on Railroads* (1 Ed.), sec. 1703, pp. 2723-25. (5) The inevitable conclusion in this case as to the verdict must be, that it was the result of partiality, or prejudice on the part of the jury, and a judgment based on such a verdict should be reversed. *Jeans v. Morrison*, 99 Mo. App. 208; *Gage v. Trawick*, 94 Mo. App. 307; *Cook v. Railroad*, 94 Mo. App. 417; *Cannon v. Moore*, 17 Mo. App. 92; *State v. Musick*, 71 Mo. 401; *State v. Zorn*, 71 Mo. 415; *State v. Jaeger*, 66 Mo. 173; *Rosecranz v. Railroad*, 83 Mo. 678; *Baker v. Stonebraker*, 36 Mo. 338; *Price & Sherrill v. Evans*, 49 Mo. 396; *Spohn v. Railroad*, 87 Mo. 74. (6) The court erred in overruling defendant's objection to the methods of examination of Drs. Hendrix, Faris and Byers by the plaintiff, and admitting evidence not based on the allegations in the petition, but contradictory thereto, nor sanctioned as hypothetical questions, and because so speculative and problematical as not to be competent as evidence at all under any phase of any case. The testimony admitted by the court as expert testimony was beyond the knowledge, skill and experience of the physicians and of the profession, and could not aid the jury. *Combs v. Construction Co.*, 205 Mo. 367; *Thomas v. Railroad*, 125 Mo. App. 131; *Goken v. Dalluge*, 72 Neb. 16 (9 Am. & Eng. A. Cas., 1222, l. c. 1224). (7) The evidence on behalf of plaintiff was all conjectural and her case should fail, and the court erred in submitting it to the jury. *Browning v. Railroad*, 106 Mo. App. 729; *Root v. Railroad*, 195 Mo. 348; *Warner v. Railroad*, 178 Mo. 125; *Peck v. Railroad*, 31 Mo. App. 123; *Smart v. Kansas City*, 91 Mo. App. 586; *Stokes v. Burns*, 132 Mo. 214; *Glick v. Railroad*, 57 Mo. App. 97; *Torpey v. Railroad*, 64 Mo. App. 382;

Caudle v. Kirkbride, 117 Mo. App. 412; Phelan v. Paving Co., 115 Mo. App. 423.

Von Mayes and Duncan & Bragg for respondent.

(1) The court properly overruled defendant's motion for a new trial. The evidence not only supported the verdict, but no inference could have been drawn therefrom by the jury except that the fracture was the result of the fall in the hole. Under the facts stated by the witnesses this inference is not adverse to physical law. *Spiro v. St. Louis Transit Co.*, 102 Mo. App. 250; *Chemical Co. v. Railroad*, 85 Mo. App. 667; *Baldwin v. City of Springfield*, 141 Mo. 205; *Charles v. Patch*, 87 Mo. 450. (2) Under this point of appellant's brief it complains of plaintiff not calling the physicians who attended her shortly after the accident. The necessity of using these witnesses was obviated by the action of the court, on motion of defendant, appointing a commission of physicians to examine plaintiff, who examined her on two different occasions and testified at the trial. *Reyburn v. Railroad*, 187 Mo. 565; *Haworth v. Railroad*, 94 Mo. App. 215; *Marham v. Herrick*, 82 Mo. App. 330. (3) The court properly overruled defendant's objections to the questions propounded by plaintiff to the expert witnesses. The purpose of these questions was to show by these physicians, versed in the fractures of bones that the partial fracture of a bone was possible, and that it was possible for a person to walk on a partially fractured bone, and that it was possible to convert a partial fracture into a complete fracture by exercising the bone partially fractured. These matters are not of such common knowledge that everyone is presumed to understand them, and were not beyond the skill or knowledge of the witnesses. *Boettger v. Iron Co.*, 124 Mo. 104. (4) The questions propounded to the physicians called for the opinion of the witnesses. Defend-

ant's objections were not made on the grounds that these questions called for a conclusion of the witnesses or sought to elicit facts beyond their knowledge and skill. *Thomas v. Railroad*, 125 Mo. App. 134; *O'Neil v. Kansas City*, 178 Mo. 91; *Schlereth v. Railroad*, 115 Mo. 87; *McCormick v. Hickey*, 24 Mo. App. 362. (5) The petition alleges a fracture of the femur bone as a result of falling in the hole. It was therefore not required that plaintiff should prove that the fracture was complete immediately after the fall. If there is a variance between the allegation and proof in this respect it is not material. The question of variance between the allegations and proof was not raised in the lower court. *R. S. 1899*, secs. 655 and 656; *Howard County v. Baker*, 119 Mo. 406; *Mellor v. Railroad*, 105 Mo. 455.

STATEMENT.—This is an action for damages for injuries sustained by plaintiff's intestate in alighting from a train of the defendant at a place called Terry, in Pemiscot county. It was commenced on the 18th of January, 1908, by Mrs. Whitworth, plaintiff's intestate, who has died since the case has been appealed to this court. For convenience and brevity, we will refer to her as plaintiff in the case, or even as respondent. In her original petition the plaintiff stated, after the formal averments of the incorporation of the defendant and that it maintained a platform at this station of Terry for the accommodation of its passengers, that on the 28th of December, 1907, the conductor in charge of the train took hold of plaintiff's hand to assist her in alighting from the step of defendant's passenger coach to the floor of the platform, and that in assisting plaintiff to alight from the train, the conductor suddenly pulled or jerked her and caused her to turn around and step backwards upon the platform, and that in stepping backwards plaintiff's right foot and leg went through a hole in the platform which defend-

ant had carelessly and negligently permitted and suffered to remain, thereby causing plaintiff to fall and be violently thrown upon her right side upon the platform; "that by reason of plaintiff's foot and right leg going through said hole in the platform, . . . and the fall of plaintiff in the manner aforesaid, and occasioned thereby, she sustained and received the following injuries without fault of her own, to-wit: A bad bruise and slight abrasion of the outer upper third of the right thigh; a slight abrasion and bruise of the inner third of the upper right thigh; a dislocation of the right hip; a rupture of the synovial membrane of the joint of the right hip; a bruise and strain of the peritoneum; a severe injure to the kidneys and lower bowels; and a sever wrench and strain of the spine and other internal and external injuries, all of which injuries are permanent in nature and character." Damages in the sum of fifteen thousand dollars are demanded. Afterwards, on September 4, 1908, plaintiff filed an amended petition, in which the injuries sustained and received are set forth as follows: "Bruise and abrasion of the outer upper third of the right thigh; bruise and abrasion of the inner third of the upper right thigh; rupture of the synovial membrane of the joint of the right hip; dislocation of the right hip; fracture and breaking of the femur bone in the right leg; bruise and strain of the peritoneum; wrench and strain of the lower spine, and other internal and external injuries, all of which are permanent in nature and character."

The answer of defendant was a general denial and plea of contributory negligence, to which plaintiff filed a reply.

The cause coming on for trial before a court and jury, evidence was introduced on the part of plaintiff tending to show that there was a hole in the railroad platform through which plaintiff had fallen; it was about ten inches wide and seven or eight feet long,

reaching about two-thirds across the platform. Plaintiff testified that on the day of the accident, when the train whistled for the stop at Terry, she got up, walked out between the coaches, and one of the train men helped her off. He stepped off ahead of her, set the footstool down, stepped back, reached up with his right hand, took hold of plaintiff and gave her a jerk and "turned her loose." She staggered backwards into the hole in the platform and her right leg went through the hole as far as it could; it was hurting her and she turned sick. She got up without assistance and went from there over to her house. That was about 11 or 12 o'clock in the forenoon; didn't remain at home during the afternoon but went over to her aunt's, a Mrs. Douglas, in the evening. Plaintiff further testified that the night after the injury, after she went to bed, she never rested to any amount all night, her hip hurt her. Her husband and a young man living with them, named Age, had to turn her over in bed and help her out of bed. The next morning she tried to get up and couldn't stand on her feet by herself; had to rest her weight on her left leg. Her husband helped her to dress and Age helped her in the kitchen. She made biscuits for breakfast and they helped her to the table and she ate breakfast. Afterward she washed the dishes, stood leaning against the stove with the weight on her other leg; started back to the bedroom but fell before she got there; sent for a doctor that night but did not get one because the roads were bad; did not get a doctor until Tuesday or Wednesday. The accident had happened the Saturday previous. Dr. Mayes, Dr. Crow and Dr. Phipps treated her at the time of her injury and confinement to bed. She suffered badly during that period and was confined to her bed. It was a couple of months before she could walk by herself, to amount to anything. The limb is short now and hurts and always has hurt her; never had had any trouble with that hip or leg before. Her health prior to the

accident was good; had had some sickness but not bad; had never had any trouble with her hip or leg before and no other fall or accident between the time she stepped into this hole and the time she was not able to move or walk on the limb, and had met with no accident since. The leg was bruised and skinned and since the injury and at the time of the trial she has suffered from a wrench or sprain of the lower spine.

On cross-examination plaintiff said that she and her husband scuffled very often; about three weeks before he and plaintiff and Arthur Age scuffled and they all fell down; had not scuffled any after she fell in the hole at the railroad platform, and had not hurt herself at all in any way after she fell in the hole; had never told anybody that falling in the hole did not hurt her hip; had received no injury whatever afterwards. This was Saturday that she went home on the noon train, and thought that they sent for a doctor Sunday evening but didn't get one; didn't get one until Wednesday, when Dr. Mayes came and examined her hip and left some medicine to quiet her. He did not set her hip that day; didn't know how long it was until another doctor came; was sick and didn't keep up with the days of the week; doesn't know what was done after that; was in bed twenty-one days before she ever sat up. Doesn't remember how often the doctor came but he was there several times; Dr. Mayes, Dr. Crow and Dr. Phipps were there together once, and Dr. Phipps had made a trip to see her since she had been up. Dr. Crow was there twice when Dr. Mayes and Dr. Phipps were with him all three of them being there together, and he made some trips alone to see her. He had treated her for the injury. Guesses anyone could see the injury by examining her without her telling them what it was; was bruised and skinned where the injury was; didn't go anywhere else that evening but from the train home and up to her aunt's, Mrs. Douglas', and back; did not walk around the house much.

On redirect examination plaintiff testified that before the accident she kept a boarding house and had twelve or twenty boarders and did her work herself; since the accident hasn't been able to do anything much; between the time she fell through the hole and the next morning she suffered some from this injury; doesn't know whether she limped during the afternoon; was sick and hurting and never noticed; had never suffered from the right hip before the accident; had had heart trouble before the accident; after the accident had suffered bad and since then has had these spells all the time, off and on, about as frequently as before.

On re-cross and redirect examination she gave no testimony materially bearing on the accident, principally about her several marriages and the birth of her child, which it appears died when it was four weeks old.

Plaintiff called Dr. Byers and Dr. Faris as witnesses on her behalf, who testified that under order of the court they had examined plaintiff, found a shortening of the right leg, in the neighborhood of two and a half inches, and attributed it to a fracture of the femur; had made a second examination, also under order of the court, and did not find plaintiff suffering from any other injury at this second examination. The right leg was some two and a half inches shorter than the left; attributed this shortening to a fracture of the thigh, of the femur, the upper third of the femur was broken. These surgeons were recalled by defendant and gave testimony practically to the same effect as that given by Dr. Hendricks.

Dr. Hendricks, called as a witness by plaintiff, was one of the three physicians who had made an examination of the plaintiff under order of the court. He testified that he had found a shortening of the right femur, about two and a half inches or more, due to a fracture of the upper third of the femur. The first

examination that the physicians made was made two or three months before the trial and the last was made a day or so before the trial. From the examination Dr. Hendricks testified that he should judge the fracture to have been in the upper third, "overriding over fragments." With the exception of this trouble she seemed to be all right; considered the injury to her limb permanent. On cross-examination Dr. Hendricks said: "The femur articulates in the hip joint and at the knee, and it was the upper third of this bone we found fractured." The fracture is in the upper third but not in the neck of the bone. "The injury was just below the great trochanter," as well as they could tell, an inch if not more below. It was a complete fracture, "an overriding of the fragments," that caused the shortening. By complete fracture the doctor said he meant that the bone was broken in two, fractured. Had had a conversation with plaintiff about having walked on the injury and she told him she had walked home, possibly to a neighbor's house; said she went to bed about 9 o'clock that night and several days afterwards she had a doctor. Dr. Hendricks then testified on cross-examination (giving his exact language): "From my examination of the injury, and the condition I found her in, in my opinion, I don't think it possible for her to have walked; don't see how it could be. If she had run her leg through a hole in the platform and received that injury, in my opinion, she would not have been able to walk home, nor to remain up; don't see how she could with a complete fracture of the femur. She gave no reason why she hadn't sent for a doctor before she did. There is one fracture of the femur that she might possibly walk with and that is an impacted fracture of the neck of the femur, but this was not such a fracture; this is a complete fracture of the bone now, so far as I know. Found her condition practically the same, the shortening about the same extent, at both examinations. Noticed no other injury." He

further testified that a fracture of the kind sustained by plaintiff is very painful at the time received and on moving it it grows worse.

On redirect examination Dr. Hendricks testified that he doesn't know whether the fracture was complete at the time plaintiff fell through the hole as he didn't see her. He said: "As to whether it was partial at first, and afterwards became complete, all I have to go by is what I found at the present time, and as it stands now I don't think she could have walked." He was asked by counsel for plaintiff, if the fracture at the time immediately after the accident was only a partial fracture and with use of the limb for half a day or more then became a complete fracture, whether the same condition would exist as it does now. This was objected to by defendant, objection overruled, defendant excepting, and the witness answered that an incomplete fracture could easily be made a complete fracture. Asked if the fracture at the beginning was merely an incomplete fracture, whether there would be anything hindering the party suffering such injury from walking a short distance or for half a day until it became a complete fracture, the witness answered that if it was incomplete it was a rare possibility that she might hobble around a little while but it is very painful if the periosteum, the covering of the bone, is ever broken. Counsel for plaintiff repeated the question, "But if it is an incomplete fracture, she can walk some until it becomes a complete fracture?" Dr. Hendricks answered: "If you have a fracture of the femur, I don't see how you could walk." Counsel asked him if he thought it was impossible to do that. This was objected to, objection overruled, defendant excepting, and witness answered: "There is a rare possibility that she might walk with an incomplete fracture, but very rare." On re-cross examination Dr. Hendricks testified that he did not think many people walked with a fractured femur, especially of the upper

third. In some cases they might do it, if the fracture would not have a break in the covering of the bone, the periosteum. You could call a fracture incomplete, if there is simply a crack on one portion of the bone, yet it might be incomplete and all broken off, "it would simply shiver;" in that instance she could not walk because the least weight would force it on. If there is a very slight fracture, she might possibly walk but if there was a fracture of any portion of the bone beyond what I would call slight, a person of any weight would naturally break it on. Mrs. Whitworth is a little bit fleshier now than when he last treated her; would judge her to weigh 165 pounds. She has always been a fleshy woman. On the second redirect examination, this witness was asked if it wasn't a fact that a woman with the strength of muscle of plaintiff, if that fracture had not been a complete fracture, whether the strength of those muscles would be more than likely to hold the limb in place, if she gives it the advantage in walking, putting the most of her weight on the other foot, couldn't she walk under these circumstances, and the witness answered that by not bearing her weight on her foot, by hobbling, she certainly could, but as he said before, he repeated, that incomplete fracture doesn't convey anything. "You don't know to what extent it is; you can't say; you can't form an opinion." He was asked by counsel if the fact that now it is a complete fracture is any reason why it could not have been an incomplete fracture at that time and afterwards became a complete one. This was objected to, objection overruled, defendant excepted, and witness answered, "No, sir, that is all right; you can convert an incomplete fracture into a complete fracture." Under re-cross examination, the Doctor stated that the diameter of this bone at that point in plaintiff would be fully an inch and a quarter. "With an incomplete fracture, it depends on the constitution of the person as to how much of the bone would have to be affected, wheth-

er the person could walk; depends on the condition of the bone. In my opinion, if she had received the injury I found, she couldn't have walked. All I can speak from is that we have at the present time, and I couldn't say to what extent of partial fracture one could walk; can't give an opinion. My opinion is with the fracture of the femur she will not walk." "There is a rare possibility," said the witness on redirect examination, "of a person walking with an incomplete fracture, but as to the extent of the incomplete fracture I wouldn't attempt to say. One can walk with a slight fracture. . . . Neither a man nor a woman would walk with a fracture of the upper third of the femur. There is a difference in a fracture and an incomplete fracture; with a complete fracture one couldn't walk. With an incomplete fracture one might walk, but I can give no opinion as to how much would be broken, the extent, and yet the person be able to walk." On final re-cross examination Dr. Hendricks said: "I found a complete fracture in Mrs. Whitworth. Can't tell whether it was at one time an incomplete fracture. Can't determine as to the exact nature of the fracture, but it was possibly an oblique fracture, across the bone slightly. Don't think it was straight across."

Witnesses for plaintiff testified that prior to the accident plaintiff had not been lame; had done her own housework.

This was substantially all the testimony offered by plaintiff and at its close the defendant asked an instruction in the nature of a demurrer to the evidence which the court overruled, defendant excepting.

Upon its part defendant introduced testimony of Mrs. Alice Douglas, plaintiff's aunt, to the effect that about a week after plaintiff stepped into the hole, she sent for the doctors to put bandages on her and said in the presence of her aunt and of Mrs. Lilly Parrot and of Frank Parrot, that Will Whitworth (plaintiff's husband) "thought that he would ride or was going to

ride on flowery beds of ease, and rock in a fine rocking chair at her expense on account of her being hurt on the railroad," and Mrs. Whitworth (plaintiff) said: "You all think I got hurt on the railroad;" but she said she didn't get hurt on the railroad; didn't say how she got hurt, and witness did not ask her. Mrs. Parrot testified to the effect that she saw plaintiff during the afternoon that she said she stepped into the hole; she was up walking around but appeared to limp some on her right leg.

The Sunday morning after the accident, a witness was at Mrs. Whitworth's, was helping her up, when Mrs. Whitworth showed her a bruised place on the inside of her right hip and on the inside of her thigh opposite the bruise on her right hip. She said that those bruises were caused by her falling into the hole in the platform. Mrs. Whitworth had some use of her right leg all the time after she got sick Sunday morning and during her sickness, but couldn't use it any better until after the doctor treated it.

Three or four days before this accident, a witness had seen plaintiff and her husband scuffling and wrestling in their yard and on their front porch, and Whitworth threw his wife down on the front porch very hard. She told witness that the fall had made her stiff and she walked lame in her right leg at that time, which was three or four days or a week before the time she stepped into the hole in the platform.

Other witnesses offered by defendant testified to the effect that they saw her on the afternoon after the accident climb up on a stump about three feet high and get onto a plank walk that led from the top of the stump near her house to the railroad and saw her walk the plank walk to the railroad; she did not limp when she was walking this plank walk and showed no sign of being crippled when she climbed upon the stump and got on the walk; saw her that afternoon get up from the table and walk about the room. On the

day of the accident, December 28th, witnesses saw her outside her house. She did not walk lame, couldn't detect any difference in her walk then and before she was injured; saw no evidence of limping. The plank walk referred to was about three and a half feet from the ground. It rested upon some posts with cleats nailed across and was used for a walk. The planks were about twelve inches wide. The walk was one plank wide in one place and two planks in another; it was over a barrow pit. To get on the walk she would have to climb up a little ash stump and she was on the plank walk when witnesses saw her. She had to walk this plank about thirty or forty feet over a water hole.

A witness (Beasley) testified that he went to plaintiff's house the day of the accident and talked with her. Plaintiff told him about how she had enjoyed her trip and about falling through the hole in the platform; that she had stepped backward and fallen into the hole. Witness asked her if it did not hurt her and she said: "It didn't hurt me seemingly at all, it didn't hurt me a bit that I know of." She told witness that falling through the hole did not hurt her and she was laughing when she spoke about it, and telling about riding on the train, and that it made her "dizzy-headed," and that that was how she came to fall through the hole when she got off the train; talked with her an hour that time and she was walking around in the house and it did not appear to witness that she limped; was intimately acquainted with her; boarded at her house; saw her the next day (Sunday morning), stayed at her house Saturday until dark, while she went over to see her uncle.

The brakeman, who assisted plaintiff off the car, and the conductor of the train testified to all they knew about the accident. It is not material to produce their testimony.

Plaintiff herself was recalled in rebuttal and denied that she had ever told Mrs. Douglas that her husband said that he was "going to ride on flowery beds of ease and rock in a fine rocking chair," on account of plaintiff having been hurt by the railroad company, nor that everybody thought she got hurt on the railroad but that she did not, and denied making any such statement; recalls the fact of Mrs. Parrot having been at her house, but not of her husband having been there; denied the statements about her condition at the time she had her baby which were testified to by Mrs. Parrot; did not tell Mrs. Parrot that she had to be helped up out of her chair; admitted that she and her husband had scuffled but said that she had never been hurt in any of these scuffles; that the last time she scuffled was about two weeks before she fell in the hole; did not tell Mr. Childs or Mr. Beasley that she was not hurt by stepping into the hole; had never received any accident or hurt to her right hip or otherwise at any time after stepping into this hole; had cooked for fifteen or twenty men and would be tired from standing on her feet and complained of her back and side and might have called it her hip. Thinks she said something to Mrs. Parrot the morning after she and her husband had scuffled the last time but did not remember what it was; did not tell any one that she always got "dizzy-headed" when she rode on the train; had been on the train a good many times and not accustomed to being made sick by it.

At the conclusion of the testimony the defendant asked for an instruction for direction of a verdict in its favor which was refused and defendant excepted. At the request of plaintiff the court instructed the jury that if they found from the evidence in the case that on the 28th of December, 1907, the defendant maintained the platform and there was an unsafe and dangerous hole in it which was known or might have been known to defendant, and if they found plaintiff was a

passenger on defendant's train on that date and that after alighting from the train and while exercising ordinary care on her part, she stepped or fell into the hole, "and as a direct result thereof the femur bone of her right leg was fractured and broken," then their verdict should be for plaintiff. The second instruction was as to ordinary care which is not criticised. The third instruction is as to the measure of damages, given at the instance of plaintiff, and is to the effect that if they found for plaintiff, in estimating her damages, they should take into consideration not only the physical injury and bodily pain and mental anguish by her endured and suffered, but also pain of body and mind, that is, the suffering, inconvenience, discomfort and annoyance, if any, as appears from the evidence would reasonably and directly result to her from the injuries in the future and their verdict should be for such sum as in the judgment of the jury under the evidence would fairly and reasonably compensate her for her damages, if any, directly resulting or that the jury may be reasonably certain will directly result to her from her injuries, not exceeding the sum of \$15,000. Defendant excepted to the giving of these instructions and at its request the court gave nine instructions, which need not be set out. An instruction, No. 1, to find for defendant was refused.

The eleventh instruction which the defendant asked is as follows:

"11. The court instructs you that even though the plaintiff has testified that her injury was received by falling into the hole, yet, if you believe such statements are contrary to the physical facts of the same evidence, you must disregard her statements for that reason with reference to her injury."

This was refused and defendant duly saved exception to its refusal, as also to the refusal to give instruction No. 1. The jury returned a verdict for \$4000 in favor of plaintiff. Motions for new trial and in ar-

rest were duly filed, overruled, exceptions saved and an appeal duly perfected to this court by the defendant.

REYNOLDS, P. J. (after stating the facts).—Errors assigned are that the court erred in admitting incompetent evidence on behalf of plaintiff; in excluding competent evidence offered by defendant; in giving the instructions for plaintiff and in refusing instruction No. 11 and the demurrer to the evidence asked by defendant, and that the verdict is excessive, the result of bias and prejudice.

There was no error in the instructions given for plaintiff.

The platform on which plaintiff fell was used by the defendant at Terry; defendant invited passengers to board or alight from its cars by means of this platform; it was required to keep it in good condition. Defendant knew or should have known of its condition, and is responsible for whatever accident happened to persons boarding or alighting from its train by reason of the defect in the platform. Nor was it error to overrule the demurrer to the evidence of plaintiff. The case was for the jury under proper instructions. We would have no hesitation in holding the appellant company responsible for any injuries received by plaintiff, and do not think that the verdict was excessive, provided we could be satisfied that the jury were warranted by the evidence in the case, in finding that the fracture of the bone and consequent shortening of the right limb by some two and a half inches, occurred by reason of plaintiff falling into the hole in the platform. The accident occurred on the 28th day of December, 1907. Twenty-one days thereafter plaintiff filed her petition in the circuit court of Pemiscot county. We have set out the material allegations in our statement. It will be noticed that the original petition avers that the injuries resulting from the accident were "a bad bruise and slight abrasion of the outer upper

third of the right thigh; a slight abrasion and bruise of the inner third of the upper right thigh; a dislocation of the right hip; a rupture of the synovial membrane (probably meaning membrane), of the joint of the right hip; a bruise and strain of the peritoneum; a severe wrench and strain of the spine and other internal and external injuries." It is in evidence in this case that a few days after the injury, plaintiff was attended by three physicians, whom she and her husband summoned. The use of the technical terms in the original petition lead to the fair inference that she described the injuries suffered by her in the accident as they were told to her or to her attorney by these physicians or surgeons who had attended her, when having in preparation the drafting of the petition in which her cause of action is set out. It is true that some of the terms used in this petition in describing the injuries received are so general that we cannot, with certainty, say under the allegation of "other internal and external injuries," a broken bone is included, but surely a fracture of any bone, much less of the femur or large upper bone of the right leg, would hardly be said to be covered by any of the specific injuries set out in this original petition, and it is almost incredible that any surgeon or physician authorized to practice in this State should confuse a fracture of the femur, so serious as to result in the shortening of the limb, with a dislocation of the right hip or a rupture of the synovial "membrane" (membrane) of the joint of the right hip, and certainly remarkable that so serious and patent an injury as the fracture of the femur should not have been specifically mentioned, if that injury was then present. On September 4, 1908, that is to say, about nine months following the filing of the first petition in the case, plaintiff filed her amended petition, in which it will be noted that the injuries charged to have been received on the occasion of the accident are, "bruise and abrasion of the outer-

upper third of the right thigh; bruise and abrasion of the inner third of the upper right thigh; rupture of the synovial membrane of the joint of the right hip; dislocation of the right hip;" (and for the first time) "fracture and breaking of the femur bone in the right leg." Then are repeated, "bruises and strain of the peritoneum; wrench and strain of the lower spine, and other internal and external injuries." Thus for the first time, and over nine months after the accident occurred, plaintiff avers that the result of the accident was the "fracture and breaking of the femur bone of the right leg." It may be said here that at the trial, and justified therein by the testimony of all the physicians and surgeons who testified, plaintiff abandoned all attempt at showing any injuries received by reason of the fall save this fracture and breaking of the femur bone of the right leg. The trial court and jury were therefore confronted with the sole proposition as to whether the fracture of this femur bone was the result of the accident met with by plaintiff when she fell or stepped into the hole in the platform at Terry. That is the question we must face in determining whether the verdict and judgment are supported by the evidence, and whether the case was properly tried. The testimony of plaintiff herself, to repeat it very briefly, is that prior to falling into the hole she had met with no other accident, and had had no trouble with her limb, and was not lame, and that subsequent to this accident at the railroad platform she had not been hurt nor had she met with any accident that could have produced the injury. Plaintiff stands practically alone in her testimony, save as to the fact that she fell into the hole, that she subsequently was confined to her bed, that when she got up she was lame, and that her leg is shortened. On many matters, such as her previous health, her declarations and statements as to the immediate effect of the accident, and the like, she is contradicted by several witnesses. The fact that her leg

is broken and limb shortened, and that this fact was known at least since the examination made some few months before the trial by the three surgeons appointed by the court, is not disputed. Nor does plaintiff deny that at least until the morning following the accident, she went about her occupations and kept on her feet, with little noticeable change from her former walk. While plaintiff stands alone in testifying that she met with no other accident, the defendant has produced no witness to the contrary—no testimony showing any prior or subsequent accident. Plaintiff herself and every one of her witnesses examined on this point, as also a crowd of witnesses introduced on the part of defendant, testified that after the occurrence of the accident on the platform, the plaintiff got up out of the hole without assistance, walked from the station to her house, which was on the other side of the railroad track and some one hundred feet back from the track, there met her husband and young Age, ate her dinner with them, this being between 12 and 1 o'clock of the 28th of December, and about two hours thereafter went from her house to that of her aunt. She remained at the house of her aunt several hours, until, as she says, between sundown and dark, and returned home and assisted in getting supper for the family. In going to or returning from the residence of her aunt, plaintiff was seen by several witnesses, her neighbors, as she crossed barrow pits or a barrow pit, alongside of the railroad track, which was spanned by a plank walk about 30 feet long. At places along this walk there was a twelve inch plank; at other places two twelve inch planks, with wooden trestles under them. One end of the walk rested on a stump two and a half feet above the ground, the other end rested on the railroad embankment. To get up on to this plank walk plaintiff was obliged to climb up this stump and then reaching the plank walk go along it to the other end. The plank walk at the time, according to the testimony, was slip-

pery and muddy. Not one of the witnesses testifies to observing that plaintiff limped or walked at any different gait from that which was her habit. All testified that she walked her usual gait. At the time of the accident, plaintiff was about 28 years old and weighed about 165 pounds. We have set out the testimony so fully in the statement that we will not go over it further.

During the period plaintiff was confined to her house or bed, about three weeks, she was attended by three physicians, whom she named. None of them were present or produced or examined at the trial. A couple of months before the trial, which was had in September, 1908, and at the instance of the defendant, the court appointed three surgeons to examine plaintiff, who conjointly examined her then, and subsequently, and a day or so prior to the trial, again examined her. These three surgeons testified unqualifiedly that if the femur bone or upper bone of the right leg was broken it would have been physically impossible for the plaintiff to have walked as she told them she had walked and moved about, and, basing their answers on facts embraced in hypothetical questions which covered the facts of her movements on the day of the accident, as testified to by all the witnesses, and on what she had herself told them, impossible for her to have walked, if she had broken the femur at the time stated. On hypothetical questions propounded to these three surgeons by counsel for plaintiff, they stated that there might have been a partial fracture at the time of the accident, and if that was a fact it might have been possible for this plaintiff to have done what she and all the witnesses testified that she had done immediately after the accident. But each of the surgeons who answered these hypothetical questions put by plaintiff's counsel, testified that no such case of partial fracture as supposed had ever come under his observation, and that he had never heard of one, that is,

a partial fracture that without any intervening cause resulted in such a complete fracture as here present. These hypothetical questions of plaintiff's counsel were objected to, but allowed. We see no error in this action of the court. Plaintiff was entitled to have her theory of the case so presented to these experts.

To meet the testimony of the surgeons, defendant asked an instruction which is numbered 11, and which we have given in full, it being to the effect that if the jury believe the statements of plaintiff about what she did after she received the injury to her leg, yet if they found that such statements were contrary to physical facts as those facts are in evidence, the jury should disregard her statements.

In the case of *Hook v. Missouri Pac. Ry. Co.*, 162 Mo. 569, l. c. 580, 63 S. W. 360, it is said that a court will treat as unsaid by a witness that which in the very nature of things could not be said.

In the case of *Phippin v. Missouri Pac. Ry. Co.*, 196 Mo. 321, l. c. 343, 93 S. W. 410, referring to many cases in which it had been held that where the established physical facts and common observation and experience conflict with the testimony of a witness, his testimony must yield and cannot be accepted as the basis of a verdict or judgment, the court says that these cases announce the law of this State so fully as to leave the question no longer open to debate or any doubt.

To the same effect are the decisions in *Champagne v. Hamey*, 189 Mo. 709, 88 S. W. 92; *Oglesby v. Missouri Pac. R. Co.*, 177 Mo. 272, 76 S. W. 623; *Weltmer v. Bishop*, 171 Mo. 110, l. c. 116, 71 S. W. 167; *Zalotuchin v. Metropolitan St. R. Co.*, 127 Mo. App. 577, l. c. 584, 106 S. W. 548; *Demaet v. Fidelity Storage & Packing Co.*, 121 Mo. App. 92, l. c. 104, 96 S. W. 1045; *Stafford v. Adams*, 113 Mo. App. 717, l. c. 721, 88 S. W. 1130; *Reed v. Chicago & S. R. Co.*, 112 Mo. App. 575, l. c. 581, 87 S. W. 65; *Spiro v. St. Louis*

Transit Co., 102 Mo. App. 250, 1. c. 263, 76 S. W. 684. In the light of all the testimony in the case, we think that an instruction covering this should have been given. Furthermore, the burden is on plaintiff to show that the injury received is directly traceable to the alleged accident. Applying this latter rule, and the rule laid down in the decisions above cited, to the facts in this case, we are of the opinion that the jury should have had the cautionary rule announced in this eleventh instruction before them. The testimony of the surgeons certainly made it very doubtful as to the possibility of the accident complained of having produced the injury under which plaintiff is unquestionably laboring and plaintiff then to have shown no immediate effects or to have been able to do as she did. In view of the testimony of plaintiff herself and the undisputed testimony of unimpeached and uncontradicted witnesses, it was a question of whether her actions were compatible with known physical laws, and the jury should have had an instruction on that line; defendant's counsel were entitled to the aid an instruction along those lines would have given in their argument of the facts of the case. Many of the cases cited go much further than we are disposed to go in this case. There are cases wherein the appellate court went over the verdict of the jury and the finding of the judge. There was no refusal of instruction, as here, but the appellate court refused to accept a verdict which in its opinion was against known physical facts. We are reluctant to do that in any case. The verdict of a jury, properly instructed, is of great weight on that question. On the refusal to give an instruction along the line of this eleventh instruction, and having the facts of the case in mind, and in the light of the above authorities, we cannot allow the verdict to stand.

We are confirmed in our view that this verdict should not stand by the failure of the plaintiff to produce witnesses and offer testimony which must have

been under her control and which was of the highest importance. The fact stares us in the face, that immediately after the happening of the accident, plaintiff was under the care of three physicians, selected by herself; that after having had the benefit of their assistance and advice, she not only made no mention whatever of the fractured bone when she drew up her petition, but has not seen fit to call those physicians as witnesses in her behalf. She could call them, the defendant could not. We think it was her duty to have produced their testimony or accounted for its absence. The vital question in this case was whether plaintiff had suffered a partial or complete fracture, or for that matter, any injury of the femur as the result of her fall. It is to be presumed that these physicians examined her sufficiently to determine whether she was then suffering from any injury to this femur. Certainly the young man Age should have been produced at the trial by plaintiff or his absence accounted for. Neither was done. He was an inmate of the house, a member of the family; was in the house when plaintiff came from the station immediately after the accident; he was presumably cognizant of all that transpired immediately upon the return home of plaintiff and for some time afterwards.

In *Reyburn v. Missouri Pac. R. Co.*, 187 Mo. 565, l. c. 575, 86 S. W. 174, the failure of the railroad to produce as witnesses persons in its employ who were presumed to have knowledge of the accident was held to be a strong circumstance against the defendant. That rule, in this case, applies especially to the absence of the testimony of this young man Age. As against the failure to produce the physicians, our Supreme Court in *Evans v. Trenton*, 112 Mo. 390, l. c. 404, 20 S. W. 614, distinctly held that the failure of plaintiff to call the attendant physicians as witnesses in her behalf, "was a strong circumstance that they would not corroborate her testimony in regard to the extent of her

injuries, and defendant was justified in urging this upon the attention of the jury." Our examination of authority leads us to think that its great weight is to the effect that the failure of the plaintiff to produce these surgeons, who, more than any one else, even the plaintiff herself, would have been qualified to testify as to the extent and nature of the injuries immediately following the accident, as well as the young man Age, is a circumstance that warrants us in entertaining serious doubt as to the good faith of the plaintiff.

In 1 Starkie on Evidence, *p. 54, the general rule is stated to be that "the conduct of a party in omitting to produce that evidence, in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him; since it raises a strong suspicion that such evidence if adduced would operate to his prejudice." So the rule is stated in 11 Am. and Eng. Ency. of Law (2 Ed.), p. 503, par. (2), and in the latter work it is stated, vol. 22, p. 1261 (c), that this rule has been applied where plaintiff, in an action for personal injuries, failed to call the physician who examined her shortly after the accident to testify as to the extent of her injuries. The authorities cited in support of this last are *Cooley v. Faltz*, 85 Mich. 47, and *Vergin v. City of Saginaw*, 125 Mich. 449. The Michigan statute covering the matter of testimony by a physician is practically identical with that of our own State. In the *Cooley* case it is said that the failure of the plaintiff to produce the physician who had attended her and who had examined and prescribed for her was a legitimate fact for the jury in determining the merits of the case. The same rule was applied in Ohio in the case of *Katisfiasz v. Railway Co.*, 24 Ohio C. C. Rep. 127. It is announced as the law of the State in New York, in the case of *Gordon v. The People*, 33 N. Y. 501, and *People v. Hovey*, 92 N. Y. 554, as well as in *Wennerstrom v. Kelly*, 27 N. Y. Supp. 326.

These two latter cases were where there was a failure to call the wife who, in that state as in ours, is incompetent, generally, as a witness. It is true that the Supreme Court of the United States, in the case of *Graves v. United States*, 150 U. S. 118, held to the contrary. But in a dissenting opinion in that case by Mr. Justice Brewer he cites the above and other cases from Michigan, as also cases from Massachusetts, Maine, North Carolina and Georgia, as well as *Starkie on Evidence*, herein above quoted, all holding contrary to the views of the majority of the court. See also notes on page 582 (II. A.), 34 L. R. A. (old series) to case of *Hay v. Peterson*, 6 Wyo. 419, where many cases are cited in support of the rule, among others, that "to smother evidence is not much better than to fabricate it." The physician, in our State, cannot be examined by the adverse party as to information acquired by him in the course of his professional employment, but his exclusion is a matter resting with the patient—a right she can waive. In the case at bar no instruction was asked by the defendant covering the absence or failure to produce these witnesses, but the point has been distinctly raised by counsel for the defendant in their assignment of error and in their brief and we mention it, not in decision of the case, but as support for the view which we take of it, that in connection with the physical facts which are testified to beyond contradiction, the absence of this testimony of these physicians, as well as of the young man Age, under the peculiar facts in this case, does make against the plaintiff. Our conclusion on the whole case is that plaintiff has fallen so far short of clearing up the case by evidence presumably within her power to produce, that while we do not feel warranted in saying there is no substantial evidence to sustain the verdict, we do think there is a lack of evidence to show that the injury is solely and directly traceable to the accident alleged. In fact this whole case, from the recitals in the original peti-

tion down to the end of the trial, the apparent conflict between known physical laws and plaintiff's own conduct, the failure to bring forward testimony and produce witnesses on the part of plaintiff, without any explanation of that failure, along with refusal to instruct on what we consider a vital issue, all contribute to render us so very doubtful of the righteousness and correctness of the verdict that we are unwilling to let it stand. It is accordingly set aside, the judgment reversed and the cause remanded. All concur.

COURT COMPTON and AGNES COMPTON, Respondents, v. MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, March 22, 1910.

1. **RAILROADS: Negligence: Injury to Child on Track: Evidence Held Sufficient.** In an action for the death of a child, evidence that an engine pushed cars against other cars which were standing adjacent to a public crossing, causing them to move forward with rapidity and without warning that they were about to be moved and run upon the child, who was on the crossing in the act of going across the tracks, and inflicting injuries from which he died, was sufficient proof of defendant's negligence.
2. ———: ———: ———: ———. Evidence that the child was seen on the crossing walking toward the tracks as though he intended to cross them, just prior to the cars being run upon him, was sufficient to prove he was in the act of passing over the tracks at the time of his death.
3. ———: ———: ———: ———. **Conflicting Evidence: Question for Jury.** The evidence being conflicting as to whether the child was crossing over the tracks, or was swinging on a car, at the time he was struck, the determination of those questions was for the jury.
4. **PLEADING: Allowing Recovery on Theory not Counted on.** A person may not count on one cause of action and recover on another, even though the latter would be a good cause of action if properly pleaded.

Compton v. Railroad.

5. **RAILROADS: Negligence: "Turn-Table Cases:" Rationale of Doctrine.** The doctrine of the "turn-table cases" is substantially to the effect that turn-tables being dangerous machines and peculiarly attractive to children, are treated as attractive nuisances, tending to invite children to play about them and entail injury unless properly enclosed or otherwise guarded.
6. ———: ———: **Cars Standing on Track: "Turn-Table Cases" not Applicable.** The doctrine of the "turn-table cases" is not to be invoked with respect to railroad cars standing on a private switch of the railroad company, for such cars, even though unguarded, are not liable to be moved by; and inflict injury upon, small children; the only obligation of the railroad company being not to suddenly move the cars without proper warning.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

REVERSED AND REMANDED.

Robert T. Railey and *James F. Green* for appellant.

(1) There was not sufficient testimony to justify a finding that plaintiffs' child was struck on the crossing, and therefore the court should have directed a verdict for the defendant. A verdict cannot be based on mere conjecture. *Connelly v. Railroad*, 113 S. W. 235; *Lynch v. Railroad*, 112 Mo. 432; *Moberly v. Railroad*, 98 Mo. 183; *Rapp v. Railroad*, 106 Mo. 423; *Peck v. Railroad*, 31 Mo. App. 128; *Myers v. City*, 108 Mo. 480; *Haynes v. Trenton*, 133 Mo. 126; *Moore v. Railroad*, 28 Mo. App. 622; *Patton v. Railroad*, 179 U. S. 658; *Warner v. Railroad*, 178 Mo. 125; *Goranson v. Mfg. Co.*, 186 Mo. 307; *Candle v. Kirkbride*, 117 Mo. App. 412; *Swearingen v. Railroad*, 120 S. W. 773. (2) The court erred in giving plaintiffs' instruction No. 2. *Barney v. Railroad*, 126 Mo. 382; *Roddy v. Railroad*, 104 Mo. 247; *Rushenberg v. Railroad*, 109 Mo. 117; *Swartwood v. Railroad*, 111 S. W. 306; *Witte v. Stifel*, 136 Mo. 302; *DeBolt v. Railroad*, 123 Mo. 506;

Kelly v. Benas, 217 Mo. 11; 2 White on Personal Injuries on Railroads, sec. 1102, p. 1641. (3) Said instruction No. 2 is also erroneous in that it authorizes a recovery on a cause of action not alleged in the petition. Chitty v. Railroad, 148 Mo. 74; Yarnell v. Railroad, 113 Mo. 570; Walheir v. Railroad, 71 Mo. 514; McManemee v. Railroad, 135 Mo. 440; McCarty v. Railroad, 144 Mo. 397; Ecton v. Railroad, 125 Mo. App. 230; Bromley v. Lumber Co., 127 Mo. App. 158. (4) The court also erred in giving plaintiffs' instruction on the measure of damages. Wilburn v. Railroad, 36 Mo. App. 215; Camp v. Railroad, 94 Mo. App. 284; Stephens v. Railroad, 96 Mo. 207; Badgley v. St. Louis, 149 Mo. 122; Hart v. Railroad, 94 Mo. 256; Parsons v. Railroad, 94 Mo. 286; Goss v. Railroad, 50 Mo. App. 614; Smith v. Fordyce, 190 Mo. 30; Carpenter v. McDavit, 53 Mo. App. 404.

William Hilkerbaumer for respondents.

(1) There is ample evidence shown by the record justifying a submission of the case to the jury and the finding of a verdict by them for the plaintiff, because there was nothing in plaintiffs' proof permitting any inference that the deceased was a trespasser, and the inference from plaintiffs' proof that the boy was struck by defendant's car while on the board crossing is not only fair, but convincing. Defendant's evidence should not be considered in determining this point. Moore v. Transit Company, 194 Mo. 1; Holloway v. K. C. 184 Mo. 19; Hollweg v. Bell Tel. Co., 195 Mo. 149; Taylor v. Iron Co., 133 Mo. 349; Frick v. Railroad, 75 Mo. 595; Montgomery v. Railroad, 181 Mo. 477; Dertring v. Transit Co., 109 Mo. App. 524; Baxter v. Transit Co., 103 Mo. App. 597; Morrow v. Pullman, 98 Mo. App. 351; Chinn v. Railroad, 100 Mo. App. 576. (2) The court did not err in giving instruction 2. Barney v. Railroad, 126 Mo. 372;

Elliott on Railroads, sec. 1260; Louisville & N. v. Popp. (Ky.), 27 S. W. 992; Ostertag v. Railroad, 64 Mo. 421; Schmitz v. Railroad, 119 Mo. 256; Kelly v. Benas, 217 Mo. 11; Cyc. Vol. 29, pp. 464-7; Fink v. Mo. Furnace Co., 10 Mo. App. 61; Kelly v. Parker-Washington Co., 107 Mo. App. 490; Dwyer v. Railroad, 12 Mo. App. 597; Schmidt v. Distilling Co., 90 Mo. 284; Cahill v. Stone Co., 96 Pac. 84; Denver Tramway v. Nichols, 84 Pac. 813; Fort Worth Ry. v. Cushman, 113 S. W. 198; Sackewitz v. Biscuit Co., 78 Mo. App. 144; Fullerton v. Railroad, 84 Mo. App. 498; Schroeder v. Michel, 98 Mo. 43. (3) Instruction No. 2 was proper under the pleadings, because it properly qualified instructions asked by defendant to the effect that the defendant was not liable if deceased was a trespasser, which was an affirmative defense. (4) The court did not commit error in giving plaintiffs' instruction on the measure of damages. Acts 1905, p. 135; Potter v. Railroad, 136 Mo. App. 125; Pratt v. Railroad, 122 S. W. 1125.

NORTONI, J.—This is a suit for damages alleged to have accrued to plaintiffs, under the statute, through the negligent killing of their infant son by defendant. Plaintiffs recovered and defendant appeals.

It appears the defendant owns and operates a railroad running east and west through the town of Greenwood in St. Louis county. At the point where the little child lost his life, it maintains two parallel railroad tracks. The evidence tends to prove that Sutton avenue in the town mentioned is used by the public and that a wagon crossing had been constructed across the railroad thereon. On its north track, defendant had standing several empty cars immediately adjacent to Sutton avenue and about six or seven feet from the west side of the street crossing. The one nearest the crossing was a coal car. The theory of plaintiffs' case is that

their infant child, between five and six years of age, was on the railroad tracks at the public crossing and in the act of crossing the same when defendant, without warning, suddenly propelled one of the empty cars over and upon him and thus occasioned his death. It appears defendant's locomotive was doing some switching on the track west of the street crossing and that it pushed other cars against those standing adjacent to the crossing with such force as to occasion them to move forward upon the crossing with rapidity, and this, too, without warning of any kind indicating the cars were about to be moved. One witness for the plaintiffs gave testimony tending to prove that the little child was seen on the crossing walking northward as though he intended to cross the tracks just prior to the cars being run upon him. There was evidence on the part of the defendant to the effect that the child had climbed upon the east end of the car next adjacent to the crossing and was hanging or swinging thereon when the cars further west were pushed against it and that he was precipitated from the end of the car forward upon the track to his death, which resulted from the car passing upon or over him. There appears to be substantial evidence tending to prove the defendant was negligent in starting the car suddenly forward, without warning of any kind, and we believe, too, there is sufficient in the record tending to prove the plaintiffs' theory that the child was in the act of passing over the track on the public crossing at the time of his death. The question as to whether or not the child was in the act of passing over the track on the road crossing at the time, or was in fact swinging on the car, as insisted by defendant, was for the jury.

However, the judgment must be reversed and the cause remanded for the reason the court submitted the case on at least one theory not relied upon in the petition. The petition charged that the infant, Willis Compton, was killed "at or near a crossing, which

said crossing was an open, public highway running over defendant's tracks, and was known as Sutton avenue; that while said Willis Compton was upon or in said crossing, and was upon or about to step upon or very near one of the tracks of said railway company, said defendant, on said day, by its engineer, conductor, servants, agents and employees in charge of a locomotive, car or train of cars of defendant, carelessly, negligently and unskillfully caused or suffered one of its cars to run against and upon said Willis Compton, and to inflict serious and fatal injuries upon him from which the said Willis Compton died on the same day. That said car striking or running upon said Willis Compton was attached to other cars forming a train of cars standing on defendant's said track, and was standing partly or wholly upon or very near said crossing; that without warning and without looking to see whether any person was at the time upon said crossing or tracks of defendant, or in danger of being injured by moving said car, defendant negligently, carelessly and unskillfully caused or suffered other cars or a locomotive to run up and against and to strike said train of cars standing upon said track as aforesaid, and caused them to move violently and suddenly forward upon said crossing, without any warning to said Willis Compton, causing the car nearest said crossing, or upon said crossing, to run upon said Willis Compton and to injure him so that he died on or about the 23d day of September, 1908, as the result of the injuries so received by him," etc.

Besides submitting the question of defendant's liability by instruction on the theory presented in the petition the court gave, at plaintiffs' instance, a second instruction whereby liability against it was predicated on the theory of the "turntable cases." The first instruction for the plaintiff authorized a recovery if the child was on the crossing, in the act of passing over the tracks on the public highway and came to

his death through the negligence of the defendant in moving the cars suddenly forward without warning, etc. Such was the theory of liability proceeded upon in the petition and other instructions should have confined the right of recovery thereto. The plaintiffs, however, seized upon evidence introduced by defendant tending to show that the child was playing or swinging upon the car standing on its private tracks about six feet from the crossing and induced the court to submit this as well as a ground of liability against defendant on the theory that it was remiss in its duty in permitting the empty cars to stand upon its track near to the road crossing in an unguarded condition so as to operate as an inducement or invitation to children to play about the same. The instruction is as follows:

“Even though you believe from the evidence that said Willis Compton was trespassing upon the property of defendant by climbing upon and hanging from said car, yet if you believe and find from the evidence that the part of the car to which he had attached himself was upon or very near said crossing, and said car was standing still, and was from its situation calculated to attract children thereto, and that this was known or might have been known to defendant by reason of its experience as a railroad company, the plaintiffs are still entitled to recover, if you believe and find from the evidence that defendant left said car in such a situation unguarded, and if you further believe and find from the evidence that said Willis Compton was injured and killed by the negligence of defendant, as elsewhere indicated in these instructions, your verdict should be for the plaintiffs.”

This was error, for a person may not count upon one cause of action and recover upon another even though the other would be a good cause of action if properly pleaded. The instructions authorizing a recovery should limit the elements of liability to the

negligence charged. The party defendant is entitled to know in advance the grounds of liability relied upon, and, besides, is not required to anticipate and defend himself on a theory not suggested in the petition. [Chitty v. St. Louis, I. M. & S. Ry. Co., 148 Mo. 64, 49 S. W. 868.]

However, the instruction submitting the "turntable doctrine" in part at least as a predicate for recovery was furthermore erroneous for the reason the doctrine is not pertinent on the facts in proof. Of this it may be said the car was not upon the crossing so as to present the element of nuisance, but instead it was six feet therefrom on defendant's property. Under these circumstances the obligation of ordinary care required no more in this case than that defendant should not move it suddenly forward without proper warning unless its servants either saw, or by exercising due care, might have seen the situation and peril of the child. The doctrine of the "turntable cases" is substantially to the effect that turntables are dangerous machines in and of themselves and are peculiarly attractive to children. They stand as an exception generally to the law of negligence for the reason the person injured thereabout is a trespasser upon the property of the owner of the machine. The grounds of liability which the courts have asserted in those cases proceed from the facts that danger inheres in the institution itself and being peculiarly attractive to children, they operate as an implied invitation exciting the childish instinct to examine and play about the same. Therefore, when left unguarded, even though upon the private property of the railroad, they are treated, from the standpoint of children, as attractive nuisances tending to invite the child to play about them and to entail injury unless properly inclosed or otherwise guarded. [Berry v. St. Louis, M. & S. E. R. R. Co., 214 Mo. 593, 114 S. W. 27; Koons

v. Railroad, 65 Mo. 592; Nagel v. Railroad, 75 Mo. 653; Kelly v. Benas, 217 Mo. 1, 11, 116 S. W. 557.]

The doctrine of these cases is not to be invoked however with respect to railroad cars standing upon their private switches, for such cars, even though unguarded, are not liable to be moved by and inflict injury upon small children. In other words, the extraordinary dangers which inhere in unguarded, unfastened and exposed turntables is not present in a car standing upon the side tracks and besides such cars are not so inviting to children as playthings. On the reasoning indicated, our Supreme Court has pointedly declared the doctrine of the "turntable cases" not relevant to railroad cars standing upon the tracks in the yards of the company. [Barney v. H. & St. J. R. R. Co., 126 Mo. 372, 28 S. W. 1069.] That the doctrine may not be extended promiscuously to all situations more or less dangerous, which are in some respects inviting to children and maintained by the owner upon his own premises, see Kelly v. Benas, 217 Mo. 1, 116 S. W. 557.

The judgment should be reversed and the cause remanded. It is so ordered. All concur.

STATE OF MISSOURI, Respondent, v. HENRY OSTMAN, Sr., et al., Appellants.

St. Louis Court of Appeals, March 22, 1910.

1. **CRIMES AND PUNISHMENTS: Principal and Accessory: All are Principals.** When several parties are jointly indicted for an offense, one for doing the act and the others for being present and aiding and abetting, all are principals, and the conviction of the principal is not a condition precedent to the conviction of the aider or abettor, or *vice versa*, for the act of one is the act of the other.
2. ———: ———: **Indictments and Informations.** Where several parties are jointly indicted for an offense, one for doing the act and the others for being present, aiding and abetting, the indict-

ment may charge them all in one count as principals in the first degree, or it may allege the matter according to the facts and charge one with being the principal and the others as aiders and abettors, in the same count.

3. ———: **Common Assault: Evidence Held Sufficient.** In a prosecution for felonious assault, evidence *held* to sustain a verdict of guilty of common assault.

4. ———: **Assault to Kill: Indictments and Informations: Election Between Counts.** Under section 1847, Revised Statutes 1899, providing that every person who shall on purpose and with malice aforethought shoot at or stab another or assault another with a deadly weapon or by any other means likely to produce death or great bodily harm, with intent to kill such person, shall be punished by imprisonment in the penitentiary for not exceeding ten years, a son was charged in one count in an indictment as principal in the first degree, and his brother and his father were charged as principals in the second degree, with aiding and abetting. Under section 1848, Revised Statutes 1899, providing that every person who shall be convicted of an assault with intent to kill or do great bodily harm, the punishment for which assault is not before prescribed, shall be punished by imprisonment in the penitentiary not more than five years or in the county jail or by fine of not less than \$100, the father was charged with the commission of the assault and his two sons charged as principals in the second degree with aiding and abetting. *Held*, that each person was charged with a felony and none with a misdemeanor, and therefore it was not error not to compel the prosecuting attorney to elect on which count he would proceed.

5. ———: **Felony: What is.** Under section 2393, Revised Statutes 1899, making a crime punished by imprisonment in the penitentiary a felony, the fact that a statute authorizes the court or jury to assess a lighter punishment than that otherwise authorized by the statute does not take away its felonious character.

6. ———: **Assault to Kill: Section 1848, Revised Statutes: Indictments and Informations: Malice not Alleged.** An information, charging an offence under section 1848, Revised Statutes 1899, providing that every person who shall be convicted of an assault with intent to kill or to do great bodily harm, the punishment for which is not before prescribed in the statute, shall be punished by imprisonment in the penitentiary not more than five years or in the county jail or by fine of not less than \$100, need not contain the words "on purpose and with malice aforethought."

7. ———: ———: **Instructions: "Ready" to Assist in Assault.** In a prosecution for assault charged to have been committed by one as principal and by two others as aiders and abettors, the jury were instructed that if they found one of the defendants actually assaulted the prosecuting witness with intent to kill him or do him great bodily harm, and further found that the other defendants were present, aiding, abetting, encouraging, or ready, if necessary, to aid, assist, or encourage, the defendant actually making the assault, then such defendants so present and ready to aid and abet therein might be found guilty with the one actually making the assault. *Held*, that the word "ready" conveys substantially the same meaning as the phrase ordinarily used, "for the purpose and with the intent to aid and assist if necessary," as the word "ready" is defined as "prepared in mind or disposition; not reluctant; willing, free, inclined, disposed."
8. ———: ———: **Conviction of Common Assault.** Under section 2370, Revised Statutes 1899, permitting a defendant charged with felonious assault to be convicted of a lesser offense, a person indicted for a felonious assault may be convicted of common assault.
9. ———: ———: **Principal and Accessory: Instructions: Submitting Whether Defendant Charged as Abettor was Guilty as Principal.** In a prosecution for felonious assault, under an indictment containing two counts, the first charging the son as principal and his father and his brother as aiders and abettors in the commission of the assault, and the second charging the father with the felonious assault and the sons as aiding and abetting him, there is no error in submitting the question whether all the defendants were guilty of assault as charged in the first count, or all guilty of assault as charged in the second count, instead of submitting the issue whether the son was guilty as charged in the first count, and the other defendant guilty of aiding and abetting him, and whether the father was guilty as charged in the second count and his two sons guilty of aiding and abetting him, since those charged as aiders and abettors were principals in the second degree.

Appeal from St. Charles Circuit Court.—*Hon. Jas. D. Barnett*, Judge.

AFFIRMED.

W. H. Clopton for appellants.

(1) The motion to require the prosecuting attorney to elect on which count he would proceed should

have been sustained. In the first count defendants are charged with a felony. In the second with a misdemeanor. Felonies and misdemeanors cannot be joined in the same indictment unless specially authorized by statute. *Hildebrand v. State*, 5 Mo. 548; *State v. Porter*, 26 Mo. 201; *State v. Kneeland*, 90 Mo. 337. (2) The first instruction given by the court is clearly erroneous. The first count charges that William Ostman made the assault with a deadly and dangerous weapon, to-wit, a stick of wood, etc., with intent, the said Henry L. Schafer . . . feloniously to kill and murder. The second count charges that Henry Ostman, Jr., and Henry Ostman, Sr., were present, aiding and abetting William Ostman. The instruction charges the jury that if they believe that the "defendants" did make an assault on Henry L. Schafer with a dangerous weapon, to-wit, a largestick of wood of the length of four feet, etc., by striking said Schafer on the head therewith, etc. The instruction should have charged the jury that if they believed William Ostman struck the blow and that Henry Ostman and Henry Ostman, Jr., were present aiding and abetting William Ostman, they were also guilty of assault. (3) The second instruction is faulty for the same reason. The third count of the information charges that Henry Ostman, Sr., assaulted Schafer. The second instruction tells the jury that if they, the defendants, assaulted Schafer, they will find the defendants guilty, etc. There was no evidence that any of the defendants assaulted Schafer except Henry Ostman, Sr. Two persons may be charged in an indictment for a felony as being principals though only one committed the act and the other stood by as an aider and abettor, both are equally guilty, and an indictment may either allege the matter according to the fact, or charge them both as principals in the first degree. *State v. Anderson*, 89 Mo. 333; *State v. Peyton*, 90 Mo. 226. But if A is charged with being the principal and B and C as acces-

sories, it is error to instruct the jury that if either struck the blow the others are guilty. (4) The error of the second instruction is not cured by the fourth and fifth instructions. The instructions are confusing and misleading. The jury should have been instructed under the first and second counts of the information that if they believed that on the day named William Ostman feloniously and with malice aforethought, etc., made an assault on William Schafer with a dangerous and deadly weapon, etc., and that Henry Ostman and Henry Ostman, Jr., were present aiding and abetting William Ostman, then all were guilty. (5) The fifth instruction is radically wrong. The defendants are entitled to know by the information what they are charged with, and the instructions of the court should confine the consideration of the jury to the offense charged in the information. The fifth instruction tells the jury that if they believe "that either or any one of the defendants actually assaulted and struck Henry L. Schafer with the intention to kill him, said Schafer, or to do him great bodily harm, and further find that the other defendants or any of them were present aiding, abetting, encouraging, or ready, if necessary, to aid, assist or encourage the defendant or defendants actually making such assault, if it became necessary to do so, then the defendant so doing or so present, are equally guilty with the one actually making the assault. The instruction is also erroneous in that it blends the law relating to felonies with the law relating to misdemeanors, and the law for the principal and that of the accessories, so that the jury under that instruction could not intelligently consider the evidence. The statute of the State defines who are accessories before the fact to be every person who shall be a principal in the second degree in the commission of any felony, or shall be an accessory to any murder or other felony before the fact, shall, upon conviction, be adjudged. Sec. 2364, p. 645, R. S. 1899. Accessories

after the fact are confined to cases of felony. Also sec. 2365. (6) There is no such offense as accessories to misdemeanors under our statute, nor of aiders or abettors of misdemeanors. Henry Ostman, Jr., and William Ostman are not charged as principals in the misdemeanor count; but as aiders and abettors. At common law there is no such offense as aiding and abetting a misdemeanor. 1 Whart. (10 Ed.), secs. 223 and 23a. (7) The eleventh instruction did not present the law of self-defense as to Henry Ostman, Sr., properly to the jury. The last part of the instruction destroys it. It gauges too nicely the proper *quantum* of force necessary to repel the assault. State v. Hickmann, 95 Mo. 328; State v. Palmer, 88 Mo. 572; State v. Smith, 125 Mo. 2, 8.

Theodore C. Bruere for respondent.

(1) The motion to require the prosecuting attorney to elect on which count he would proceed was properly sustained. State v. Grant, 144 Mo. 57; State v. Pitts, 58 Mo. 556; State v. Burk, 89 Mo. 635; State v. Melton, 102 Mo. 683. (2) Under an indictment for assault with intent to kill or for a felonious assault the defendant may be convicted for assault and battery or common assault. State v. Wilson, vol. 103, No. 1, p. 110; State v. Schloss, 93 Mo. 361; sec. 2370, R. S. 1899; sec. 2369, R. S. 1899; State v. Rambo, 95 Mo. 463; State v. Webster, 77 Mo. 566. (3) All distinction between principals, and principals in the second degree have been abolished. All who are present aiding and abetting those who actually commit the offense are principals. If two persons are charged as principals—one as the immediate perpetrator of the crime, and the other as aiding and abetting, it is immaterial which of them is charged as having inflicted the wound or struck the blow, inasmuch as the law imputes the injury given by one as the act of the other. State v. Dalton, 27 Mo. 13; State v. Walker, 98 Mo. 95; State v. Nelson,

98 Mo. 414; State v. Orrick, 106 Mo. 111; State v. Johnson, 111 Mo. 578; State v. Brown, 104 Mo. 365; State v. Hermann, 117 Mo. 629.

NORTONI, J.—The defendants were informed against in the circuit court for felonious assault. Having pleaded not guilty, they were tried by a jury and convicted of the offense of common assault. The punishment of the defendant, Henry Ostman, Sr., was fixed at a fine of one hundred dollars, and that of his two sons, Henry Ostman, Jr., and William Ostman, at a fine of fifty dollars each. From this judgment all of the defendants prosecute an appeal.

The first argument advanced for a reversal of the judgment assumes that the information is in four counts and that the first and third counts thereof, those charging the principal offense, are wholly insufficient for the reason they fail to conclude by employing the words, "against the peace and dignity of the State," as required by the Constitution. It is argued that the first count charges the principal assault to have been made by William Ostman, and that the second charges Henry Ostman, Sr., and Henry Ostman, Jr., with aiding and abetting the same. This being true, it is said the judgment of conviction thereon cannot be sustained for the reason that if the first count against William Ostman is fatally defective in that it is not concluded by the words, "against the peace and dignity of the State," there is then no charge against the principal offender. And if there is no charge against the principal, then none may be sustained against the others as aiders and abettors. The identical argument relates as well to what is said to be the third and fourth counts of the indictment. Whatever may be said touching other features of the proposition advanced, it is sufficient here to reject the entire argument on the ground that it is false in an assumption of fact; that is to say, it is false in assuming the

indictment to be in four counts. Upon looking into the same carefully, it appears to be in two counts only. The first paragraph of the first count charges the defendant, William Ostman, with the offense of felonious assault, and the second paragraph of the same count charges Henry Ostman, Sr., and Henry Ostman, Jr., with aiding and abetting him therein. After charging all three defendants as mentioned, the count concludes, as required by the Constitution, with the words, "against the peace and dignity of the State."

The first paragraph of the second count charges Henry Ostman, Sr., with a felonious assault and the second paragraph of the same count charges Henry Ostman, Jr., and William Ostman with aiding and abetting their father in the commission of the offense. This count also properly concludes, as is required by the Constitution, with the words, "against the peace and dignity of the State." It seems the separate paragraphs referred to have been mistaken for separate counts of the indictment. And as there were two paragraphs in each count of the indictment, they have been put forward as four separate counts thereof.

The first count charges in substance that William Ostman feloniously, willfully, on purpose and with malice aforethought, did make an assault on the body of Henry Schafer with a dangerous weapon, to-wit, a stick of wood of the length of four feet, of the diameter of three inches and of the weight of three pounds, said William Ostman did strike and wound said Schafer on the head with the intention and purpose, willfully and with malice aforethought, to feloniously kill and murder him. The second paragraph of this count charges that Henry Ostman, Sr., and Henry Ostman, Jr., feloniously, on purpose and with malice aforethought were present aiding, abetting, assisting, comforting, counseling, and maintaining said William Ostman in such felonious assault. As stated before, after all this, the first count properly concludes by em-

ploying the words, "against the peace and dignity of the State."

The second count charges substantially that Henry Ostman, Sr., with force and violence upon the body of said Henry Schafer, unlawfully, willfully and feloniously did make an assault with intent him, the said Henry Schafer, feloniously, willfully and unlawfully to do great bodily harm and to kill and murder. The second paragraph of the same count charges that the two sons, Henry Ostman, Jr., and William Ostman were feloniously, willfully and unlawfully present, aiding, helping, abetting, assisting, comforting, advising, counseling and maintaining said Henry Ostman in said felonious assault with the intent to kill and murder Schafer. After all of this, and other proper form, the second count concludes by employing the words, "against the peace and dignity of the State."

There can be no doubt that under our law when several parties are jointly indicted for the commission of an offense, the one for doing the act and the others with being present and aiding and abetting, all are regarded as principals and the conviction of the principal is not a condition precedent to the conviction of the aider or abettor or *vice versa*, for the act of one is the act of the other. [State v. Anderson, 89 Mo. 312-333, 1 S. W. 135; State v. Phillips, 24 Mo. 475, 481; State v. Ross, 29 Mo. 32; see also sec. 2364, R. S. 1899; Ann. St. Sec. 2364, 1906.] In such circumstances, the indictment may charge them all in one count together as principals in the first degree and thus conform to the conclusion of the law on the fact or it may allege the matter according to the fact, as was done in this case; that is to say, it may allege the offense against the principal actor as principal and the others as aiders and abettors all in the same count. It is immaterial how the charge may be made, the law regards them all as principals. [State v. Anderson, 89 Mo. 312, 333; State v. Taylor, 21 Mo. 477, 480; State

v. Payton, 90 Mo. 220, 226; Kelley's Criminal Practice, Secs. 46, 47, 48. See also State v. Stacy, 103 Mo. 11, 15 S. W. 147.] To include all of the defendants in each count of the information was entirely proper.

It appears that on the evening of the difficulty, Schafer met Henry Ostman, Jr., in the public road near Schafer's home, and they engaged in a conversation about draining a lake in the neighborhood. Henry Ostman, Sr., came along the road while his son was conversing with Schafer. A quarrel immediately ensued between Henry Ostman, Sr., and Schafer, but there is evidence pro and con as to who was the aggressor. Ostman, Sr., said Schafer had accused him of stealing a plow and this was the grievance out of which the quarrel arose. Schafer was knocked down and while lying on the ground, Henry Ostman, Sr., got upon him and beat him severely in the face. It is said he hit him twelve or fifteen blows and William Ostman struck him in the head with a club which rendered him unconscious. During the quarrel and just prior to the blow of Henry Ostman, Sr., which felled Schafer to the ground, Henry Ostman, Jr., approached Schafer with his fist clenched in a threatening attitude. While the parties were all thus engaged, a brother of Schafer came along and stopped the assault. This is the substance of the testimony for the state, and it appears that Schafer was brutally beaten. The evidence is abundant to support the verdict.

Among the errors assigned, one is to the effect that the prosecuting attorney should have been required, before the evidence was received, to elect on which count of the information he would proceed. The argument relating to this matter is that felonies and misdemeanors may not be joined in the same information unless the statute authorizes as much, and there is no statute to authorize the joining of a felonious assault and a common assault, or misdemeanor. It is sufficient to say with respect to this matter that each count in the in-

formation charges the defendant with a felony. The first count is founded upon section 1847, Revised Statutes 1899, Ann. St. sec. 1847, 1906, which provides that every person who shall on purpose and with malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill such person, etc., shall be punished by imprisonment in the penitentiary for a term not exceeding ten years. As before stated, William Ostman was charged in this count as principal in the first degree and his father, Henry Ostman, Sr., and brother, Henry Ostman, Jr., were charged therein as principals in the second degree, or as being present, aiding and abetting, etc. The second count charges Henry Ostman, Sr., as principal, under section 1848, Revised Statutes 1899, Ann. St. sec. 1848, 1906. This statute says that every person who shall be convicted of an assault with intent to kill or do great bodily harm, etc., the punishment for which assault is not before prescribed in the statute, shall be punished by imprisonment in the penitentiary not more than five years or in the county jail or by fine of not less than one hundred dollars. The two sons, Henry Ostman, Jr., and William Ostman, were charged in this count according to the fact as principals in the second degree with aiding and abetting their father in the commission of the assault alleged. As stated before, even though the parties are charged the one as principal in the first and the others as principals in the second degree, the law regards them all as principals if they were present and acted together. It is therefore manifest that each was charged with felony and none with a misdemeanor. Under our criminal code, a crime which may be punished by imprisonment in the penitentiary is a felony. [Sec. 2393, R. S. 1899, Ann. St., sec. 2393, 1906.] And the fact that the statute authorizes the court or jury to assess a

lighter punishment than that otherwise authorized by the statute does not take away its felonious character. [State v. Green, 66 Mo. 631; State v. Reeves, 97 Mo. 668.] As each of the offenses charged might have entailed a penitentiary sentence in the discretion of the jury, each was a felony. But it is said, omitting to charge in the second count that the assault therein alleged was committed with malice aforethought rendered that count one for misdemeanor only. In answer to this, it is sufficient to say that section 1848, Revised Statutes 1899, Ann. St. 1848, 1906, on which the count was based, does not contain the words, "on purpose and with malice aforethought," as does section 1847, *supra*. The courts have ruled many times that those words are not essential in charging a felonious assault under section 1848. See State v. Stewart, 29 Mo. 419; State v. Seward, 42 Mo. 206; State v. McDonald, 67 Mo. 13; State v. Temple, 194 Mo. 228, 92 S. W. 494. There was no error committed by the court in not compelling the attorney for the state to elect between the counts.

The fifth instruction for the state is criticised for the reason it uses the word "ready" with reference to those who were present as aiders and abettors. The instruction substantially tells the jury that if they found one of the defendants actually assaulted Schafer with intention to kill him or do him great bodily harm and further found that the other defendants were present, aiding, abetting, encouraging or ready, if necessary, to aid, assist or encourage the defendant actually making the assault, then such defendants so present and ready to aid and abet therein, if it became necessary to do so, might be found guilty with the one actually making the assault. The word "ready" is said to be objectionable. It is true the words ordinarily used in this connection are "for the purpose and with the intent to aid and assist if necessary." However,

we believe the word "ready" if necessary to aid and assist, conveys substantially the same meaning in the connection it was used in the instruction. Webster says the word "ready" means prepared at the moment . . . prepared, in mind or disposition; not reluctant; willing, free, inclined, disposed. This is certainly sufficient for the purposes of the case, for if the aiders and abettors were prepared at the moment and so inclined and disposed, they were certainly there for that purpose. The question was squarely met and so ruled by the Supreme Court in *State v. Gooch*, 105 Mo. 392, 16 S. W. 892.

It is argued that there is error in the instruction submitting the question whether all the defendants were guilty of assaulting Schafer, as charged in the first count, or all guilty of assaulting him, as charged in the second count, instead of submitting the issue whether William Ostman was guilty, as charged in the first count, and the other two defendants of aiding and abetting him; and whether Henry Ostman, Sr., was guilty, as charged in the second count, and his two sons of aiding and abetting him. The argument proceeds on the assumption that the two counts charged the two abettors therein named as accessories before the fact and therefore they could not be found guilty as principals. The proposition is unsound. Instead of being accessories before the fact, those charged in the two counts as aiders and abettors were principals in the second degree. [Bishop, Criminal Law (8 Ed.), sec. 604; *State v. Ross*, 29 Mo. 32; *State v. Phillips*, 24 Mo. 480.] All of the common law distinctions as to principals and accessories before the fact have been abolished by our criminal code. Section 2364, Revised Statutes 1899, Ann. St. sec. 2364, 1906, and as before said, the parties may be proceeded against and convicted as principals. [*State v. Stacy*, 103 Mo. 11, 15 S. W. 147.] Had the defendants been actually convicted of the felony this matter would be entirely im-

material as the statute cited provides that every person who shall be a principal in the second degree in the commission of any felony or who shall be an accessory to any felony before the fact "shall, upon conviction, be adjudged guilty of the offense in the same degree and may be charged, tried, convicted and punished in the same manner as a principal in the first degree." [Sec. 2364, R. S. 1899, Ann. St. sec. 2364, 1906.] But the defendants were convicted of a common assault only, that is a misdemeanor, and on this fact it is argued there could be no accessories to a misdemeanor. This may be true, but if it is, it is not because the law excuses a person who procures or aids and abets another in the commission of a misdemeanor. On the contrary, it is for the reason the law regards such person as a principal in the offense and, generally speaking, treats him accordingly.

The statutes, section 2370, Revised Statutes 1899, Ann. St., sec. 2370, 1906, expressly permit a defendant charged with felonious assault to be convicted of the lesser offense, as here, and it has been several times decided since the statute cited has assumed its present form, that a person indicted for a felonious assault may be convicted of common assault instead. [State v. Johnson, 81 Mo. 60; State v. Grimes, 29 Mo. App. 470.] As before stated, if any one of the defendants assaulted Schafer and the others were present aiding and abetting him, they were all guilty as principals and might have been convicted as such under an information either charging the crime according to the fact as does the one before us, or charging all of the defendants as principals in the first degree. Touching this matter, the case of State v. Anderson, 89 Mo. 312, 1 S. W. 135, is in point.

The case seems to have been well and carefully tried and the judgment should be affirmed. It is so ordered. All concur.

J. GARNETT ATWATER, Respondent, v. A. G. EDWARDS BROKERAGE COMPANY, Appellant.

St. Louis Court of Appeals, March 22, 1910.

1. **GAMBLING CONTRACTS: Purchase and Sale of Stocks and Bonds: Intent of One Party Only to Gamble.** Under sections 2337, 2338, and 2342, Revised Statutes 1899, the intent of either one of the parties to a transaction to gamble in it or to speculate on the rise and fall of the market makes the contract void, notwithstanding the other party is innocent and wholly unaware of the intention of the other party to gamble.
2. ———: ———: **Brokers and Agents: Right to Recover Affected by Gaming Intent of Principal.** An agent or broker who conducts such transactions cannot recover for his services, though he has no knowledge of the unlawful intent of his principal, for the reason no enforceable rights can accrue under the unlawful contract; and if the broker knows of the unlawful intention of the parties to the contract and brings them together for the purpose of consummating it, he cannot recover because he is *in pari delicto*.
3. ———: ———: **Intent of One Party Only to Gamble: Common Law Rule.** At common law, contracts for the purchase and sale of stocks and bonds are illegal as gambling transactions only when it appears that both parties intended to speculate on the rise and fall of the market.
4. ———: ———: ———: **Common Law Presumed to Obtain in Foreign State.** In the absence of evidence of the existence of a statute of a foreign state denouncing gambling contracts for the purchase and sale of stocks and bonds, the common law rule with respect thereto is presumed to obtain.
5. ———: ———: **Intent of One Party Only to Gamble: Contract Performed in Foreign State.** Contracts made by a broker, who was employed in this State for the purchase and sale of stocks and bonds in another state, are not void by reason of the intent of one of the parties thereto to gamble, unless made void by the laws of such other state.
6. ———: ———: ———: ———: **Rights of Brokers and Agents.** The contracts declared illegal by the statute are those for the purchase or sale of stocks, etc., and not those creating the relation of principal and agent between a party thereto and the broker; so that where the contracts of purchase and sale were

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valid as made in another state, a broker employed in this State could recover his commissions, notwithstanding such contracts would be void, if made in this State.

7. **CONTRACTS: Laws of Other States: Public Policy.** The comity between states does not require courts of one state to enforce rights accruing under contracts valid by the laws of another state, if to do so would violate the public policy of the state of the forum as declared by statute.
8. **EVIDENCE: Admissions: Party Bound by Own Testimony.** In an action to recover money paid in settlement of an account in stock transactions, plaintiff is bound by his own testimony that the transactions were gambling transactions, so as to preclude a recovery by him.
9. **——: Adverse Party not Bound by Opponent's Testimony.** In an action to recover money in settlement of stock transactions conducted by defendant as broker for plaintiff, where defendant counterclaimed, asking judgment for the amount of an assigned account growing out of stock transactions, evidence by plaintiff that he intended to gamble in the transactions out of which his claim as well as the counterclaim arose, while binding on him, was not conclusive on defendant, as the jury might disbelieve it and find for defendant on the theory plaintiff was misstating the facts to escape payment.
10. **GAMBLING: Purchase and Sale of Stocks and Bonds: Applying Proceeds of Gambling Contract to Payment of Valid Transactions.** The acceptance by a brokerage firm of a fund in the hands of another brokerage firm as a payment on a balance owing it by one of its customers for valid transactions, said fund being the fruits of a gambling transaction between said customer and the second brokerage firm, would not infect and destroy the validity of the indebtedness owing by said customer to said first brokerage firm, although it knew said payment was the fruits of a gambling transaction.

Appeal from St. Louis City Circuit Court.—*Hon. Chas. Claflin Allen*, Judge.

REVERSED AND REMANDED.

George L. Edwards for appellant.

(1) The appellant was entitled to recover upon its second counterclaim regardless of the fact, if such be a fact, that the consideration for the note which

forms the basis of this counterclaim, was an indebtedness resulting from the purchase and sale of shares of stock by the co-partnership for the respondent, which he did not intend to deliver or receive because such purchases and sales were made in the city of New York and State of New York, and appellant was entitled to show such fact and therefore not within the operation of sections 2337 and 2338 of our statutes, avoiding such purchases and sales because of an unlawful intent of one party. *Brokerage Co. v. Stevenson*, 160 Mo. 516; *Gaylor v. Duryea*, 95 Mo. App. 574. (2) The appellant was not concluded by what the respondent stated his intention to be in the course of his dealing with it and with the co-partnership. This was a status of mind which the appellant was entitled to have inquired into as any other question of fact. *Knorpp v. Wagner*, 195 Mo. 665.

Thompson & Campbell for respondent.

NORTONI, J.—This is a suit on an account for a balance alleged to be due plaintiff as a result of certain transactions conducted by the defendant as his agent in the matter of purchase and sales of stocks and bonds on the market. The defendant admitted the correctness of plaintiff's account, urged that it arose from gambling and interposed two separate counterclaims on which it prayed for a judgment against him. During the trial plaintiff testified that he did not intend to either receive or deliver the stocks or bonds purchased and sold on his account by the defendant, and at the conclusion of the case, the court dismissed not only the petition but the defendant's counterclaims as well. From this judgment, the defendant prosecutes the appeal.

It appears the defendant is an incorporated concern engaged in the brokerage business in the city of St. Louis. It appears, too, that A. G. Edwards & Sons,

a co-partnership, conducts a brokerage business in the city of St. Louis in the same office occupied by the defendant, A. G. Edwards & Sons Brokerage Company. Defendant A. G. Edwards & Sons Brokerage Company, conducts its brokerage business in St. Louis and deals in local stocks, bonds, etc., whereas the A. G. Edwards & Sons co-partnership deals and conducts its business in buying and selling stocks on the stock exchange of the city of New York. It seems that the several co-partners of the firm of A. G. Edwards & Sons are almost, if not identical, with the several stockholders of the defendant, A. G. Edwards & Sons Brokerage Company. Be that as it may, the two concerns are different and distinct in that the corporation conducts its business in this State and the co-partnership deals in the New York Exchange. Although the two concerns, the corporation and the co-partnership, maintain offices at the same place and in the same rooms in the city of St. Louis, they keep a separate and distinct set of books and each conducts a separate and distinct business. The business of buying and selling stocks and bonds, conducted by the defendant brokerage company, pertains to local stocks and bonds and the accounts with reference to such transactions on its books are known to the customers who deal with both as the local account. The business conducted by the A. G. Edwards & Sons co-partnership, in buying and selling stocks and bonds on the New York Exchange, is kept by that firm in their separate books and known to the customers, who deal with both concerns, as the New York account.

Several years before the institution of this suit, the plaintiff, without knowledge of the fact that there were two concerns doing business in the same office, entered into a course of dealing with both by authorizing them to buy and sell certain stocks and bonds on the market for him. The plaintiff's account with both concerns ran along several years and it seems that he

was occasionally furnished a statement thereof from each. Such local stocks and bonds as were bought and sold for the plaintiff's account were bought and sold for him by the defendant brokerage company and the accounts with reference thereto were carried in its books. So much of his transactions as pertained to the buying and selling of stocks and bonds in New York was conducted for him by the A. G. Edwards & Sons co-partnership and the accounts of those transactions were carried in the books of the co-partnership. While the plaintiff says he did not know at the time, as a matter of fact, that he was dealing on the market through the agency of two different concerns, it appears that he knew the business was being carried in two separate accounts, one known as the local and one as the New York account, and that he received some statements of account from A. G. Edwards & Sons Brokerage Company and some from A. G. Edwards & Sons. Finally, after the transactions by the different concerns on plaintiff's account had continued for several years, the plaintiff suspended further operations on the market and in effect revoked the agencies which theretofore obtained. At the time of suspending operations and revoking the agencies, the defendant brokerage company owed him as a balance on its accounts pertaining to such transactions as were had in local stocks and bonds, the sum of \$4278.95. At the same time, plaintiff owed the A. G. Edwards & Sons co-partnership, for advances and commissions, a balance upon the New York account, pertaining to transactions conducted by it for him on the New York Exchange, of about \$9500. Plaintiff was informed of the state of the two accounts, so he says, but was not informed as to the fact that one concern was a corporation and the other a co-partnership. As both the A. G. Edwards & Sons Brokerage Company and the A. G. Edwards & Sons co-partnership were controlled by the same individuals, the defendant corporation paid over

to the A. G. Edwards & Sons co-partnership the \$4278.95 which it owed plaintiff; and the co-partnership credited plaintiff's account with it to that amount; that is to say, it reduced the balance of \$9500 owed by the plaintiff on the New York account to that extent. The plaintiff knew the balance of \$4278.95 owing to him on the local account was passed to his credit on the New York account, but it seems did not know that the two concerns were separate and distinct. He made no objection at the time to the amount stated being passed to his credit in the New York account, for, as he says, he thought he was dealing with one and the same concern and, of course, under those circumstances, it would have the right to make the credit whether he objected or not. Afterwards, the plaintiff executed his two promissory notes for the balance which he owed on the New York account, after having deducted the amount of the credit above referred to. The account of plaintiff's indebtedness to A. G. Edwards & Sons co-partners was thus closed by plaintiff's giving the two notes mentioned on September 30, 1903. Each of the notes, by their terms, became due on demand. One was for two thousand and some odd dollars and the second, that with which we are concerned in this case, for \$3077.56. In a short time, the plaintiff paid the first, or \$2000, note but with that matter we are not concerned. The second, or \$3077.56, note remained unpaid and is involved here as will presently be further noted as a counterclaim, having been assigned by the co-partnership to the present defendant.

Several years after these transactions, the plaintiff discovered the fact that he had been dealing through the agency of two concerns instead of one as he theretofore supposed. After having discovered that he had been operating in local stocks through the defendant brokerage company and in New York stocks through the A. G. Edwards & Sons co-partnership, plaintiff instituted this suit against the A. G. Edwards & Sons

Brokerage Company for the balance of \$4278.95 which it owed him at the time he suspended the agency. The theory of the case is that as the two were separate and distinct concerns, the brokerage company was without authority to apply the balance it owed plaintiff to his credit on the New York account, and it appears conclusively that plaintiff had not authorized the act.

Before the institution of the suit, plaintiff demanded payment of the amount from the defendant. His purpose having been thus revealed, the defendant procured an assignment from A. G. Edwards & Sons of so much of the account of the co-partnership against the plaintiff as it had supposed was theretofore paid by means of the credit referred to, that is so much of the account as continued to remain open, and an assignment as well of plaintiff's note for \$3077.56, which remained unpaid. This suit being thereafter instituted for the balance of \$4278.95, the defendant, in its answer, although not admitting that it intended to gamble, pleaded first that the plaintiff entertained such an intention at the time all the transactions were had through it. It alleged that at the time plaintiff claimed it became indebted to him in the sum of \$4278.95, plaintiff intended by the purchase and sale in such stocks and bonds, through the defendant, to gamble in the rise and fall of the market price of said stocks and bonds. Because of the plaintiff's alleged intention in that behalf, the defendant invoked the provisions of sections 2337, 2338, Revised Statutes 1899, sections 2337, 2338, Ann. St. 1906, in bar and alleged that such transactions were therefore void and illegal under the provisions of section 2342, Revised Statutes 1899, section 2342, Ann. St. 1906. Further answering, in the third count, defendant set up as a counterclaim so much of the account of A. G. Edwards & Sons against the plaintiff which had theretofore been assigned to it, amounting to \$4478.71 and prayed judgment thereon. There appears to be a discrepancy of about \$200 in

the amount of this counterclaim and the plaintiff's original account. It may be explained however by reference to the items of interest, calculated on both, which appear and are included in the prayer for relief by both parties.

In the fourth count of its answer, the defendant asserted a counterclaim on the plaintiff's negotiable promissory note for \$3077.56 and interest which had theretofore been assigned to defendant by the A. G. Edwards & Sons co-partnership. In the reply, the plaintiff pleaded that each of defendant's counterclaims was without consideration and void; that the account assigned to it by the A. G. Edwards & Sons co-partnership was infected with illegality on account of having accrued as a result of gambling transactions between the parties and that although he executed the note referred to, it was void and unenforceable for the same reason. There was no evidence introduced other than that on the part of the plaintiff. The plaintiff himself, besides testifying to the correctness of the accounts and other facts hereinbefore recited, stated positively and unequivocally that he never at any time, during the transactions, intended to either receive or deliver any of the stocks or bonds purchased by defendant or the A. G. Edwards & Sons co-partnership on his account. He said that in all of the transactions he intended only to gamble in the rise and fall of the market. At the conclusion of the plaintiff's case, the court dismissed his petition and refused to permit the defendant to either proceed to trial on its counterclaims or to withdraw the same and, therefore, dismissed both. The defendant insisted that although the plaintiff testified he intended to gamble that it did not and insisted as well that in so far as it was concerned, it had a right to the opinion of the jury as to whether or not the plaintiff himself so intended at the time the transactions were had. Furthermore the defendant insisted that although the plaintiff may have

intended to gamble, as he said, that such intention on his part would not preclude its right of recovery on the two counterclaims set up in the answer which accrued as a result of contracts made by the co-partnership, A. G. Edwards & Sons, for plaintiff in the State of New York and not within the influence of our statute. Notwithstanding these arguments, the court dismissed both of defendant's counterclaims on the theory, it seems, that all of the transactions were void as against the public policy of this State, declared in the statutes above referred to, and asserted, too, that even though those represented by the counterclaims were conducted elsewhere, the consideration for the counterclaims had become contaminated or infected with the illegal intention of the plaintiff to gamble through the act of the defendant in intermingling the accounts, as it were, by paying over the sum of \$4278.95 owing to plaintiff by it in the first instance to the credit of his account with A. G. Edwards & Sons with respect to the New York transactions. There can be no doubt that under the law of this State, as declared by our Supreme Court, the defendant was entitled to either proceed to trial on or withdraw its counterclaims as it chose.

Our statutes, sections 2337, 2338, 2342, Revised Statutes 1899, denounce and level an inhibition against transactions of the character set forth in the plaintiff's testimony. Those statutes denounce all purchases or sales or pretended purchases or sales or contracts and agreements for the purchase and sale of stocks and bonds, etc., on margin or otherwise, without intention of receiving and paying for the property so bought or delivering the property so sold. All buying or selling or pretended buying or selling of such property on margin or on optional delivery when the party selling the same does not intend to deliver or when the party buying the same does not intend to receive the full amount thereof, if purchased, are declared to be gambling

transactions and unlawful. They are, therefore, prohibited. It is made a criminal offense, too, for parties to intentionally participate in such transactions. By section 2342, all contracts made in violation of the other sections cited are denounced as gambling contracts and void. In construing these statutes, our Supreme Court has declared and established the rule that the intent of either one of the parties to gamble in such transactions or to speculate on the rise and fall of the market, is sufficient to and does render the contracts absolutely void and of no effect, notwithstanding the other party may be ever so innocent and wholly unaware of the intention to gamble entertained by the other. The theory of the law declared by our Supreme Court in civil actions with respect to this is that each of the contracting parties is responsible for the intent of the other if it be an unlawful intent. And it seems the circumstances that the broker is merely an agent of the party entertaining the unlawful intent does not alleviate the rigor of the rule in the least in so far as he is concerned. In other words, the agent or broker conducting the operations, even though entirely innocent is precluded as well from his right of recovery by the unlawful intent of his principal. The doctrine in so far as an innocent broker is concerned is no doubt rested upon the proposition that the contract which he has negotiated between the parties being absolutely void in the first instance, no enforceable rights may accrue to anyone thereunder and, therefore, he must forego his advances and commissions. [Connor v. Black, 119 Mo. 126, 24 S. W. 184; Connor v. Black, 132 Mo. 150, 33 S. W. 783; Edwards Brokerage Co. v. Stevenson, 160 Mo. 516, 61 S. W. 617.] But if the broker is privy to the unlawful design of the parties and with knowledge of the intention of either brings them together for the purpose of entering into an illegal agreement, he is then, of course, *in pari delicto*. In such circumstances, the doctrine denying his re-

covery proceeds upon the theory and is rested upon that principle of the law which levels its condemnation in all cases against one who is *particeps criminis*. [Irwin v. Williar, 110 U. S. 499.]

In so far as the account sued upon by the plaintiff is concerned, it appears conclusively that each and every transaction therein indicated, which affords the balance of \$4278.95, was conducted by the defendant for him as his agent or broker in this State. In such circumstances, they fall within the inhibition of the statutes and each and all of those transactions are shown conclusively to be void in so far as the plaintiff is concerned, for he is precluded by his own testimony to that effect and it appears, too, that he is precluded on that score by the allegations of his reply. He not only pleaded in his reply, but testified as well, that as to all those transactions he intended to gamble in the rise and fall of the market only. The court therefore very properly dismissed his petition, for he, at least, was precluded by his own testimony. But the same is not true with respect to the counterclaims on any theory of the case. It is true the defendant's answer pleaded that the plaintiff intended to gamble in all transactions had with it but no such averment is present touching the transactions conducted by A. G. Edwards & Sons in New York and represented by the counterclaims. The answer seems to have been so framed as to transactions had through this defendant because of the fact plaintiff had given testimony theretofore to the same effect. However, there is not a word to be found therein which indicates that either this defendant or A. G. Edwards & Sons intended to gamble. Defendant's theory, maintained throughout, is that both it and A. G. Edwards & Sons at all times acted in the utmost good faith without any knowledge of the plaintiff's intention to use either as instruments in illegal transactions. There was no testimony introduced on the part of the defendant and there is noth-

ing in the case indicating what its intention was nor what the intention of the co-partnership, A. G. Edwards & Sons, was with respect to such transactions as were conducted by it for plaintiff. However, the matter with respect to A. G. Edwards & Sons is immaterial here for those transactions were carried on in New York and not within the influence of our statute. It is to be observed that none of the items relied upon by the defendant in the counterclaims accrued on account of its agency. Those items represented by the counterclaims relate exclusively to the transactions had by the firm of A. G. Edwards & Sons in the New York Stock Exchange on the plaintiff's account and, therefore, something more than the mere intention of one party to gamble is essential to render such transactions obnoxious to the law. In other words, such transactions are not void at common law because of the unlawful intention of one party only. In the absence of a statute denouncing them, contracts of the character involved in these counterclaims are illegal as gambling transactions only when it appears that both parties intended to speculate in the rise and fall of the market. [Crawford v. Spencer et al., 92 Mo. 498, 4 S. W. 713; Gaylord v. Duryea, 95 Mo. App. 574, 69 S. W. 607; A. G. Edwards & Sons Brokerage Co. v. Stevenson, 160 Mo. 516, 61 S. W. 617.] It is certain that our statutes are without extra territorial force, and in the absence of their appearing in evidence a statute of New York denouncing such contracts, the presumption is the common law rule with respect thereto obtains in that jurisdiction. As stated, at common law, such contracts are not rendered illegal by the intent of one party only. [Edwards Brokerage Co. v. Stevenson, 160 Mo. 516, 61 S. W. 617; Gaylord v. Duryea, 95 Mo. App. 574, 69 S. W. 607.] It appearing that each of the defendant's counterclaims arise out of transactions or contracts conducted by the co-partnership, A. G. Edwards & Sons, on the New York Stock Exchange,

as agent for the plaintiff, they are enforceable in the courts of this State under the ruling of our Supreme Court squarely in point. See *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516, 61 S. W. 617.

The doctrine of that case is manifest that the contracts denounced as illegal by our statutes are the contracts by which stocks or bonds are purchased or sold and not that creating the relation of principal and agent between the parties. If the legality or illegality of the agent's advances for and commissions on the account of his principal were to be tested by the contract of agency out of which the transactions grew in the first instance, it would seem that even the matters set forth in the counterclaims before us would fall within the inhibition of our statute as both of the parties were residents of this State and the contract of agency entered into here. But our Supreme Court, in *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516, 61 S. W. 617, saw fit to omit to notice the question suggested and treated the suit by the agent against his principal for advances and commissions as though the validity of the subject-matter should be ascertained and determined by reference to the law of the state where the purchases and sales were actually made by the agent or by another agent at its instance and request. The doctrine of that case is, therefore, to be interpreted, notwithstanding the fact the agent's claim against his principal for advancements and commissions, as here, must essentially rest in the first instance on the contract of agency, the legality or illegality of the subject-matter for which the recovery is sought is to be determined by reference to the law of the state where the agent actually conducted purchases and sales on his principal's account and not by that of the state where the agency was created. It seems, too, the Supreme Court in that case applied the general rule and enforced the right on the principal that a contract valid by the laws of the state where made is to be enforced

in any other jurisdiction where it may come in question, without noticing the exception to the effect that the comity existing between sovereignties does not require the courts of one state to enforce rights accrued under contracts valid by the laws of another state if to do so is violative of the public policy of the *forum* as declared by the statute. [Lawson on Contracts (2 Ed.), sec. 341; Cyc. Law and Prac. 675, 676, 677, 678, 679, 680; *Flagg v. Baldwin*, 38 N. J. Eq. 219; *Bartlett v. Colliers* (Wis.), 85 N. W. 703; *Bryan v. Brisbin*, 26 Mo. 243.] See also *Thurston v. Rosenfield*, 42 Mo. 474; *Kerwin & Co. v. Doran*, 29 Mo. App. 397 and a highly instructive article by Judge Lawson, 54 Central Law Journal, 223.

However, under the Constitution, *Edwards Brokerage Co. v. Stevenson*, *supra*, is conclusive on this court and its doctrine rules this case identically as in *Gaylord v. Duryea*, *supra*. In this view, it is entirely clear that defendant is entitled to recover on the two counterclaims set up in the answer, unless it appears they were infected with illegality by reason of the intention of both parties to merely speculate in the rise and fall of the market. It is certain that the unlawful intention of the plaintiff only, as shown by the record before us, is not sufficient to defeat the defendant's right of recovery on the counterclaims accrued through transactions of the co-partnership of A. G. Edwards & Sons for him in New York.

Moreover, it may be said on this score that even if the intention of one party alone were sufficient to defeat the defendant's right of recovery on the counterclaims, it should have been accorded a hearing with respect to that matter so long as the intention of A. G. Edwards & Sons was not admitted to be unlawful. The defendant is certainly not conclusively bound by the expressed intention of the plaintiff only unless the jury finds the fact. Our Supreme Court has recently said

in the case of Knorpp v. Wagner, 195 Mo. 637, 665, 93 S. W. 961, "if a certain state of mind is in issue to allow a case to pass off on the mere *ipse dixit* of the person that his mind were thus and so would be for him to decide the case himself, and the court or jury would have nothing to do but to enter a verdict." While the plaintiff is concluded by his testimony that he intended to gamble, this, of course, does not conclude the defendant on that score in so far as the right to enforce its claim is concerned. If the case fell within our statute, it may be on full proof that the jury would decline to accept the plaintiff's version of the matter and give a verdict for the defendant on the theory that plaintiff was misstating the fact in order to escape payment.

It is to be remembered that there is nothing in the defendant's answer which may be construed into an admission that either it or its assignor, A. G. Edwards & Sons, intended to gamble in any of these transactions. The entire allegation therein touching this matter is that the plaintiff intended to gamble in such transactions as were conducted by defendant only. However, in view of the answer, it is entirely clear that had all the transactions occurred in this State then it would have been entirely proper for the court to dismiss the counterclaims as well as the petition, as under our statute, the intent of one party is sufficient to invalidate the whole transaction. Even though the defendant denied such intent on its part by pleading the same on the part of the plaintiff, it would have brought so much of its counterclaim arising out of transactions within this State, if any, within the inhibition of the statute because of its confessing the intent of the plaintiff in that respect.

As to the proposition that even though the matters evidenced by the counterclaims were valid under the laws of New York and therefore otherwise enforceable, they were infected with illegality because of

the fact that the defendant, A. G. Edwards & Sons Brokerage Company, paid to the co-partnership, A. G. Edwards & Sons, the \$4278.95 owing by the Brokerage Company to plaintiff on an illegal contract and A. G. Edwards & Sons accepted such payment and credited the same on their account of about \$9500 against plaintiff. We are unable to perceive how this transaction could infect with illegality the matter of the New York account if it were otherwise lawful. Although A. G. Edwards & Sons may have known that the \$4278.95 it received from the Brokerage Company was the fruits of a gambling transaction and, therefore, tainted with illegality as between the plaintiff and the Brokerage Company, certainly such illegality between those parties would not infect and destroy the validity of the indebtedness owing by the plaintiff to his agent, A. G. Edwards & Sons, if such indebtedness is otherwise valid in accordance with views above expressed.

The judgment should be reversed and the cause remanded. It is so ordered. All concur.

THOMAS B. ARNOLD, Respondent, v. RAILWAY
STEEL SPRING CO., Appellant.

St. Louis Court of Appeals, March 22, 1910.

1. **MASTER AND SERVANT: Employment: Contract by Year: Evidence.** Evidence *held* to support a finding that a contract of employment was by the year.
2. **——: ——: Accord and Satisfaction: Evidence: Exclusion Harmless Error.** Where, whether plaintiff was employed by the year or at the employer's will, he relinquished his contract upon an agreement by his employer to pay him a certain monthly sum for a period of time less than he claimed the contract was to run, constituting a valid accord and satisfaction, the exclusion of competent evidence tending to show the contract of employment was for an indefinite period, in an action to recover an unpaid balance due under the agreement, was not reversible error.

3. **ACCORD AND SATISFACTION:** Consideration: Doubtful Claim: Master and Servant: Contract of Employment. Where it was doubtful whether, under a contract of employment, the employer could discharge the employee before March, 1907, the tender and acceptance of a certain sum per month from the date of dismissal until January, 1907, in satisfaction of the contract, was a valid accord and satisfaction.

Appeal from St. Louis City Circuit Court.—*Hon. Robt. M. Foster*, Judge.

AFFIRMED.

John S. Leahy and Block & Sullivan for appellant.

(1) The contract of hiring as shown by respondent's testimony was at will and not for a year. *Boogher v. Insurance Co.*, 8 Mo. App. 534; *Finger v. Brewing Co.*, 13 Mo. App. 311; *Evans v. Railroad*, 24 Mo. App. 114; *Martin v. Insurance Co.*, 148 N. Y. 119; *Greer v. Arlington Mills*, 1 Pen. Del. Sup. Ct. Rep. 581; *Railroad v. Robinson*, 3 Colo. 144; *Orr v. Ward*, 73 Ill. 119; *Prentiss v. Ledyard*, 28 Wis. 133. (2) The prior decision in this case, being erroneous, should not be followed. *Chamber's Admr. v. Smith's Admr.*, 30 Mo. 158; *Boone v. Shackleford*, 66 Mo. 497; *Guion v. Waggoner*, 116 Mo. 151; *Bird v. Sellers*, 122 Mo. 32; *Rutledge v. Railway Co.*, 123 Mo. 131; *Wilson v. Beckwith*, 140 Mo. 369; *Beasley v. Smith*, 158 Mo. 523; *Williams v. Butterfield*, 119 S. W. 19. (3) An accord and satisfaction must rest upon agreement. *Perkins v. Headley*, 49 Mo. App. 561; 16 Cyc. 312; *Wilkerson v. Bruce*, 37 Mo. App. 156; *Land & Lumber Co. v. Lumber Co.*, 136 Mo. App. 181. (4) Assuming a contract at the beginning for a year's service, and after its termination the engagement was at will. *Rose v. Carbonating Co.*, 60 Mo. App. 28; *Embry v. Dry Goods Co.*, 115 Mo. App. 130, 127 Mo. App. 383. (5) The instruction given for respondent submitted, without explanation, a question of law to the jury. *Stevens v.*

Crane, 37 Mo. App. 494; Estes v. Fry, 22 Mo. App. 123; Kendall, etc., Co. v. Bain, 46 Mo. App. 590; Carroll v. Campbell, 110 Mo. 571. (6) The court erred in excluding from the jury the testimony of Fitzpatrick as to the terms of the original contract. Buchanan v. Achison, 39 Mo. 503; R. S. 1899, sec. 2906; Glasgow v. Ridgley, 11 Mo. 26; Walsh v. Agnew, 12 Mo. 525; Fox v. Webster, 46 Mo. 185; Leszinsky v. Dispatch Line, 14 Mo. App. 598; Warlick v. Peterson, 58 Mo. 408; Patton v. Railroad, 87 Mo. 122; Williamson v. Brown, 195 Mo. 328.

Carter, Collins, Jones & Barker for respondent.

(1) The contract of hiring between plaintiff and defendant as shown by respondent's evidence was a contract for a year, and when continued after its expiration without a new agreement, the employment continued under the terms of the original contract. 26 Cyc. 969 and 976, and cases cited; 20 Am. and Eng. Ency., p. 16, and cases cited; Hendrix v. Mill Co., 77 Mo. App. 224; Arnold v. R. Steel Spring Co., 131 Mo. App. 612; King v. Railroad, 140 N. C. 433. (2) Whatever has once been passed upon on appeal, will, in the same case upon a second appeal, be treated as no longer open to dispute or further controversy. Searles v. Lum, 89 Mo. App. 239; Railroad v. Combs C. Co., 89 Mo. App. 182; Overall, Admr., v. Ellis, 38 Mo. 209; Redpath Bros. v. Lawrence Manning & Cushing, 48 Mo. App. 429; Rice v. McFarland, 41 Mo. App. 409; Rigsby v. Oil Well Sup. Co., 130 Mo. App. 128; Chapman v. Railway, 146 Mo. 481; Railroad v. Bridge Co., 215 Mo. 286. (3) Even if there was no contract of hiring for a year, and the question had not been adjudicated, the disputed claims of the parties were sufficient consideration to support the compromise contract sued on. There was more than reasonable grounds for belief in the validity of the claim. 1 Cyc. 316; Dailey v. Jessup,

72 Mo. 144; Land & Lumber Co. v. Lumber Co., 136 Mo. App. 181; Bank v. Rockefeller, 174 Fed. 22. (4) The term, "yearly employment," used in an instruction does not require definition. If so, appellant used it also without interpretation, which estops it from complaining at this time. Fearey v. O'Neill, 149 Mo. 477; Wheeler v. Bowles, 163 Mo. 409; Railroad v. Shoemaker, 160 Mo. 434; Harmon v. Donohoe, 153 Mo. 274; Iron Co. v. Carpenter, 67 Md. 554; Harper v. Fidler, 105 Mo. App. 689. (5) A question asking for the substance of a conversation is improper, as it permits witness to state conclusions, and decide what is and what is not material. The objection was not against the form of the question, but against the matter called for. State v. Miller, 44 Mo. App. 165; Muff v. Railroad, 22 Mo. App. 587; Madden v. Railroad, 58 Mo. App. 673; Sparr v. Wellman, 11 Mo. 150.

GOODE, J.—The facts of this litigation will be found stated in the opinion delivered on the former appeal (131 Mo. App. 612). The proposition is reasserted on the present appeal that plaintiff's employment by defendant was at will and not by the year. We held before the evidence went to prove it was by the year and adhere to the ruling; indeed, think the argument to the contrary is without force and the authorities cited to support it are not in point. In the conversation leading up to the contract of employment, defendant's officers said to plaintiff "about six thousand dollars a year is as much as we want to pay for the first year;" further, one of the officers said to plaintiff: "You will be raised as I have been right along every year after that;" he also said: "Six thousand dollars in St. Louis is better than \$7500 in New York." The gist of the argument for defendant is, the contract was at the rate of six thousand dollars a year, but the period of the employment was not stipulated. We think the evidence not only tended to prove

the contrary, but conclusively proved it. Plaintiff was expected to throw up his residence in New York and move his family to St. Louis, and this fact is to be coupled with the foregoing statements. Plaintiff was discharged without cause in August, 1906; for his year did not expire until March 16, 1907. The arrangement made between him and defendant at the date of the discharge, was the latter should pay him five hundred dollars a month from said date to the first of January, 1907. He was paid the first five hundred dollars, but the installments due from September to December, inclusive, were not paid on the ground plaintiff had taken employment from a competitor of defendant contrary to his agreement. This action is to recover the balance alleged to be due. On the supposition there was no contract for a definite period and defendant might discharge plaintiff when it would, its counsel argue there was no consideration for the promise to pay plaintiff for time subsequent to his discharge. The argument falls with its premises that the contract of employment was not by the year, for the jury found it was and we hold the evidence supports the finding. Moreover, we may say if this was not true, the right of the matter was fairly debatable and as the parties came to an accord and satisfaction, the agreement sued on had a sufficient consideration and is enforceable.

An exception was taken to the exclusion of part of the deposition given by Fitzpatrick, one of defendant's officers. The material portion of the excluded matter was a statement that Silverthorn, another officer of defendant, had told plaintiff in the conversation which resulted in the employment, the company had intended to offer plaintiff five thousand dollars a year, but to make it an inducement to him to come with the company, would pay him five hundred dollars a month, which was at the rate of six thousand dollars a year. This evidence is said to have been competent as tending to prove plaintiff's employment was not by the

year, but was for an indefinite period at five hundred dollars a month or six thousand dollars a year. Likely the testimony should have been admitted; but we hold its exclusion was not reversible error; because, as said, whether plaintiff was employed by the year or not, the condition on which he relinquished his contract was an agreement by defendant to pay him five hundred dollars a month during the five months between the date of his dismissal and the end of the year 1906; and as in any view of the case, the right to discharge plaintiff before March, 1907, was doubtful, this accord and satisfaction was valid. The result was in favor of the right party unless plaintiff violated a term of the second agreement, the one on which he declared. Whether he did or not was well submitted to the jury and determined in his favor.

The judgment is affirmed. All concur.

CORINTH WOOLEN MILLS, Appellant, v. WABASH RAILROAD COMPANY, Respondent.

St. Louis Court of Appeals, March 22, 1910.

COMMON CARRIERS: Delay in Transporting Goods: Evidence to Establish Contract Insufficient. Plaintiff delivered goods to defendant railroad company, to be transported to a point on the line of a connecting carrier. The consignee refused them, and thereupon plaintiff wrote to defendant, asking it to have the goods returned and enclosing the bill of lading. Defendant did not answer this letter nor expressly agree to do anything, but did make an effort to have the goods returned by the connecting carrier. There was no proof of payment of the usual tariff charges. The connecting carrier did not promptly return the goods, and plaintiff brought suit against defendant, alleging it had breached a contract to have the goods returned within a reasonable time. *Held*, it was not so certainly established such a contract was made as to preclude the trial court from finding it was not made.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

AFFIRMED.

Pearce, Davis & Curlee for appellant.

N. S. Brown and *Walter N. Davis* for respondent.

GOODE, J.—This case was submitted on the following agreed statement of facts:

“It is agreed that the following are the facts in the above case and this agreed statement is submitted in lieu of all testimony:

“Defendant is a common carrier of freight by rail to and from St. Louis, Mo. Bazar, Kansas, is a station on the line of the Atchison, Topeka & Santa Fe Railway Company, a common carrier of freight by rail, whose line connects with the line of the defendant. The defendant has no line of railway through Bazar, Kansas.

“On the 31st day of October, 1906, the plaintiff, a manufacturer of clothing in the city of St. Louis, Missouri, delivered to defendant, at St. Louis, Missouri, one case or box of clothing of the value of \$177, consigned to D. Johnson, Matfield Green, Kansas, to Bazar, Kansas, and defendant issued to plaintiff its bill of lading therefor. Said case of goods was safely carried within a reasonable time by the defendant and the said Atchison, Topeka & Santa Fe Railway Company to destination, Bazar, Kansas.

“The said goods were refused by the consignee, and were not delivered by the Atchison, Topeka & Santa Fe Railway Company to the consignee. The said goods, then in the possession of the Atchison, Topeka & Santa Fe Railway Company at Bazar, Kansas, were the property of plaintiff, after their refusal by the consignee. While the said goods were so in the possession of the Atchison, Topeka & Santa

Fe Railway Company at Bazar, Kansas, plaintiff, on November 19, 1906, wrote to M. L. Becker, freight claim agent of the defendant at St. Louis, Missouri, the following letter:

"We hand you herewith original bill of lading for our shipment of October 31, 1906, to Matfield Green, Kansas. This shipment has been refused by the consignee, and we will ask you to kindly have same returned to us, charges following."

"Attached to said letter was the original bill of lading for said shipment.

"One week is a reasonable time required for transportation of goods from Bazar, Kansas, to St. Louis, Missouri. Defendant sent instructions contained in said letter of November 19, 1906, to the agent of the Atchison, Topeka & Santa Fe Railway Company at Bazar, Kansas, and the said goods were returned to plaintiff at St. Louis, and arrived at St. Louis and were delivered to plaintiff on February 2, 1907. The afore-said letter of November 19th was the only notice given to the defendant or any other person to return said goods. Matfield Green is not on any railroad and goods intended for that point are carried by rail to Bazar, Kansas, that being the nearest shipping point. The market value of said goods on February 2, 1907, was \$87.50 less than during the period from November 19th to December 15th."

The petition alleged the goods in question were transported by defendant and the connecting carrier from St. Louis to Bazar, Kansas, were refused at the latter point by the consignee, plaintiff notified of the refusal, then plaintiff sent to defendant the original bill of lading for the shipment, instructed defendant to have the goods returned to plaintiff at St. Louis, defendant accepted the bill of lading for said purpose "and thereupon undertook and promised, for the usual tariff charges, to have the goods returned to plaintiff within a reasonable time," ten days would have been a reason-

able time, but defendant did not have the shipment returned until February 2, 1907.

The agreed facts do not show conclusively the contract alleged in the petition by which defendant agreed to have the goods returned to plaintiff within a reasonable time and for a consideration. The averred consideration to defendant for the supposed contract was "the usual tariff charges," but nothing is said in the stipulated facts about this consideration. The stipulation contains a letter plaintiff had transmitted to defendant asking the latter to have the shipment returned, and this letter was accompanied by the bill of lading; but that defendant answered the letter, or in any other way agreed with plaintiff to take upon itself the responsibility to see the shipment was returned, is not necessarily to be inferred from the circumstances agreed upon, but, at most, would only be inferable by the trier of facts. That all defendant undertook to do was to give notice to the final carrier in whose possession the goods were, to return them to plaintiff, consists as well with what happened, *i. e.*, the sending of the letter and bill of lading to defendant and thereafter a direction by the latter to the Atchison, Topeka & Santa Fe Company to return the goods. Plaintiff's letter contains these words: "charges following;" but there is nothing in the agreed statement to show those words meant the usual tariff charges, and they might mean some other reasonable sum. Hence the alleged consideration of a contract between plaintiff and defendant for the latter to return the goods, was not established. Defendant did not expressly agree to do anything, but what the letter asked it to do was "to kindly have the goods returned to plaintiff," and this it made an effort to do. At any rate, neither the letter nor the acts of the parties fairly can be held to have established so certainly a contract by which defendant took upon itself the task of seeing the goods were returned to plaintiff within a reasona-

ble time, as to preclude the court from finding it did not agree to do this.

The judgment is affirmed. All concur.

STATE OF MISSOURI, Respondent, v. CALVIN
BRANCH, Appellant.

St. Louis Court of Appeals, March 22, 1910.

CRIMES AND PUNISHMENTS: Appellate Practice: No Bill of Exceptions. Where no bill of exceptions is filed, and no error appears in the record proper, the judgment will be affirmed.

Appeal from St. Louis Court of Criminal Correction.
—*Hon Wilson A. Taylor*, Judge.

AFFIRMED.

Willis H. Clark for appellant.

Phillips W. Moss for respondent.

GOODE, J.—This appellant was convicted of vagrancy in the court below and brought the case here for review. No bill of exception has been filed, and finding no error in the record proper, the judgment will be affirmed. All concur.

**J. Q. SMITH et al., Appellants, v. JEFFERSON
BANK, Respondent.**

St. Louis Court of Appeals, March 22, 1910.

1. **APPELLATE PRACTICE: Special Jury: Refusing to Discharge: Discretion of Court.** Where the record on appeal omits the *voir dire* examination of a special jury and there is nothing to support an accusation of policy in summoning the jury and the probability of bias in its members unfavorable to the party claiming error and no abuse of the court's discretion to try the cause by a special jury appears, an exception taken to the overruling of a motion to discharge said jury will be disallowed.
2. **FACTORS: Powers of Factors: Limitation of Authority.** An invoice containing the words "terms, cash on delivery of goods" limits the authority of the consignee, as between him and the consignor, to pass title by sale or reconsignment, unless the course of business pursued by them has been in disregard of similar restrictions in invoices of prior shipments.
3. ———: ———: **Transactions with Third Parties.** One having no knowledge of restrictions on the power of a consignee, with power to sell or reconsign, may deal with him as having complete power to pass title.
4. ———: ———: ———: **Evidence: Invoice Sent to Factor Incompetent as to Third Persons.** A consignor shipped goods to a factor to sell or reconsign and a corporation controlled by the consignee received and reconsigned the goods and sold the draft drawn against them to a bank, which took possession of the goods and retained the proceeds on a sale thereof. In an action by the consignor against the bank for conversion, the invoice of shipment to the consignee containing the words "terms, cash on delivery of goods" was incompetent against defendant, for it had never seen it and hence knew nothing of the supposed restriction of the authority of the consignee to dispose of the goods.
5. ———: ———: ———: **Sale by Person Other Than Consignee: What Purchaser Must Show.** The invoice of a shipment to a consignee contained the words "terms, cash on delivery of goods." The consignee had power to sell or reconsign and take bills of lading and attach them to a draft. A corporation, controlled by the consignee, received the goods, reconsigned them, and sold the draft drawn against them to a bank, which took possession of the goods and retained the proceeds on a sale thereof. The bank had no knowledge of the restriction

on the power of the consignee to dispose of the goods. *Held*, that the bank, to maintain its title against the consignor, must show that the acts done by the corporation were ordered by the consignee or persons authorized to act in his absence, or that the consignor either expressly or by a course of dealing authorized the corporation to act as agent, or that the consignor, with knowledge of the facts, ratified the transaction.

6. ———: ———: ———: ———: ———: **Course of Business: Ratification of Factor's Acts: Evidence.** A consignor shipped goods to a factor to sell or reassign. A corporation controlled by the consignee reassigned the goods, and sold the draft drawn against them to a bank, which took possession of the goods and retained the proceeds on a sale thereof. The corporation sent its own draft to the consignor in payment of the goods, which the consignor accepted and transmitted to a bank for collection, but the draft was dishonored because of the insolvency of the corporation. *Held*, that evidence of a course of business whereby the corporation when it needed money drew drafts on the consignor, which the bank cashed and the consignor paid, was competent against the consignor to affect him with notice of the insolvency of the corporation at the time he accepted the draft, and thus show ratification by acceptance of the corporation's disposition of the goods as his agent.
7. ———: ———: ———: **Similar Facts or Transactions: Evidence.** A consignor shipped goods to a factor to sell or reassign. A corporation controlled by him reassigned the goods and sold the draft drawn against them to a bank, which took possession of the goods and retained the proceeds on a sale thereof. The consignor sued the bank for conversion after he had accepted the draft of the corporation sent in payment of the goods, but which draft was not paid because of the insolvency of the corporation. There was nothing to show the bank knew of the financial condition of the corporation. *Held*, that evidence of prior drafts drawn by the corporation or the consignee against the consignor, discounted by the bank and paid by the consignor, disconnected with the transaction in controversy, were inadmissible as against the bank, since they threw no light on the issues and did not conduce to prove the bank knew the insolvent condition of said corporation.
8. **INSTRUCTIONS: Not Based on Evidence.** An instruction without evidence on which to rest is properly refused.
9. ———: **Covered by Others Given.** It is not error to refuse a requested instruction which is covered by others given.
10. ———: **Singling Out Facts.** An instruction commenting on particular facts by singling them out is properly refused.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. H. Williams*, Judge.

AFFIRMED.

P. C. Young for appellant.

(1) The court erred in refusing to discharge the special jury. "While statutory provisions respecting the drawing of a jury are regarded as discretionary merely, it does not follow that essential provisions of the statutes can be absolutely disregarded." *State v. Austin*, 183 Mo. 478; *State v. Lehman*, 175 Mo. 619. A special jury should be denied where no particular skill or knowledge is demanded and where no reason why the cause cannot be disposed of by the regular panel exists. *Emerson v. McCullough*, 2 Mort. C. & P. 483; *Walsh v. Ins. Co.*, 2 Rob. (N. Y.) 646; *Ives v. Ranger*, 20 N. Y. Supp. 32; *Hartshorn v. Geltson*, 3 Cal. (N. Y.) 84. (2) The court erred in refusing to admit the invoices as evidence. If the Central Bank knew that the purchase money had not been paid by Imboden, it was not an innocent purchaser when it placed the proceeds of the wheat to the Imboden account. That Imboden & Co. were indebted to the Central Bank made no difference, it could not apply and it could not pay the debt of the one with the funds of another without the consent or knowledge of the latter. *Commission Co. v. C. Bank*, 116 Mo. 585; *Schloss v. Feltus*, 96 Mich. 619; *McIvers v. Williams*, 83 Wis. 570; *Warner v. Martin*, 11 How. (U. S.) 209; *Miller v. Schneider*, 19 La. Ann. 300, 92 Am. D. 535; *Benny v. Begram*, 18 Mo. 191, 59 Am. D. 298; *Hoffman v. Carmer*, 123 N. C. 566; *Gerard v. Taggart*, 5 Ser. & R. 19, 9 Am. D. 327; 2 Clark and Styles Agency, sec. 882.

Block & Sullivan for respondent.

(1) Appellants did not disaffirm the act of the Mound City Produce Company in reconsigning and

drawing drafts against the eggs in question, but retained the drafts sent them by the Mound City Produce Company on July 18th in part payment for the said eggs, and still had these drafts long after this suit was brought; hence there was no rescission or disaffirmance and they could not bring or maintain this suit. *Implement Co. v. Ellis*, 125 Mo. App. 692; *Chemical Co. v. Nickels*, 66 Mo. App. 678; *Estes v. Reynolds*, 75 Mo. 565; *Roeder v. Robertson*, 202 Mo. 535. (2) The granting of a special jury is the exercise of a common law power vested in the judges of this State, and may be granted at any time within the discretion of the trial judge. *State ex rel. v. Withrow*, 133 Mo. 503; *Eckrich v. Transit Co.*, 176 Mo. 622. (3) Where proper objection is made, it is not competent to introduce evidence contradicting allegations set out in a party's pleading. *Wilson v. Albert*, 89 Mo. 546; *Kuhn v. Weil*, 73 Mo. 215; *Weil v. Poston*, 77 Mo. 284. (4) Where a factor also buys and sells merchandise on his own account, he may be dealt with as an owner. *Crocker v. Irons*, 3 Mo. App. 486; *Smith v. Bank*, 120 Mo. App. 543. (5) An endorsee for collection is a holder for value if he parts with value on the faith of the transfer. *Bank v. Ball*, 60 Mo. App. 588; *Ames v. Bank*, 79 Mo. 421; *Smith v. Bank*, 120 Mo. App. 543. (6) An endorsee for value of a draft is a holder for value of the property represented by the bill of lading accompanying the paper. *Dymock v. Bank*, 67 Mo. App. 104; *Smith v. Bank*, 120 Mo. App. 527.

At the request of plaintiff the court gave the following instructions:

"1. If you find from the evidence the eggs belonged to the plaintiffs when the drafts were turned over to the bank and that the bank then had knowledge of such facts and circumstances as would put a reasonably prudent and careful person upon inquiry, as to the title thereof or the right of the Mound City Produce

Company to dispose of them, then it was the bank's duty to make such inquiry, as the law does not permit one to remain ignorant when the means of knowledge are at hand.

"2. To authorize the Mound City Produce Company to draw upon these eggs and deposit the drafts to its own credit with the defendant bank, the evidence must satisfy you of the existence of at least one of the following propositions: That it had direct authority to do so from the plaintiffs or that with the knowledge, consent and approval of the plaintiffs it had received such authority from B. W. Redfearn, W. P. Johnson, or Claude L. Gunn, or that such authority was conferred upon it by a previous course of dealing or that the plaintiffs ratified its acts with reference to these eggs. Should you not be satisfied from the evidence of at least one of the foregoing propositions then your verdict should be for the plaintiffs. The burden of proving any one of these propositions is on the defendant.

"3. To warrant you in finding authority was conferred by a previous course of dealing upon the Mound City Produce Company to draw upon the eggs and place the drafts to its own credit with the defendant bank and remit the proceeds in its own drafts, you must be satisfied from the evidence of both of the following propositions: First, that a course of dealings had actually existed on the part of the Mound City Produce Company, prior to July 18, 1904, and that the plaintiffs knew, or by the exercise of ordinary prudence ought to have known, of such previous course of dealings. The burden of proving such previous course of dealings and knowledge thereof on the part of the plaintiffs is on the defendant.

"4. The defendant does not contend in its answer that the drafts of the Mound City Produce Company upon itself, one for \$1175, and the other for \$1300,

sent to the plaintiffs at the time the eggs were reconstituted, were received by the plaintiffs as actual payment for the eggs; but does contend that by receiving and placing said drafts of the Mound City Produce Company upon itself to their own credit, the plaintiffs so confirmed and ratified the acts of the Mound City Produce Company with reference to their eggs that they cannot recover against the defendant bank. To warrant you in so finding you must be satisfied from the evidence that the plaintiffs at the time they made such deposit with their own bank at Fredonia, were not laboring under any mistake as to material fact or facts in the case. The burden of showing such ratification is on the defendant.

"5. Should you find from the evidence that B. W. Redfearn, C. L. Gunn and W. P. Johnson were the plaintiffs' agents to dispose of the goods, then you are instructed they could not delegate, authorize or empower either the Mound City Produce Company or any one else, to act in their place for the plaintiffs without their knowledge, consent or ratification. The burden of showing that the Mound City Produce Company was authorized to draw upon these eggs and deposit said drafts to its own credit with the defendant bank is on the defendant.

"6. You are instructed that the court has used the word 'goods' as referring to the eggs in controversy and that bills of lading represent the title of the eggs and anything that might or might not be done with the goods applies equally to the bill of lading.

"7. If you should find for the plaintiffs, then your verdict should be in their favor for the market value of the eggs, in the city of St. Louis, on the 18th day of July, 1904, and in addition you may, if you shall think fit, give damages in the nature of interest, over and above the value of the goods at the time they were taken, at not to exceed six per cent per annum on the entire value of the eggs, from said 18th day of

July, 1904, to the present time; that is, such damages not exceeding the said rate as you may find from the evidence the plaintiffs have suffered on account of the said conversion of the said eggs, if any."

At defendant's request the court gave the following:

"8. If the jury find from the evidence that the two carloads of eggs in controversy in this case were reconsigned in St. Louis by or at the direction of W. B. Redfearn, or in his absence that such was done by Claude L. Gunn; and if the jury believes from the evidence that drafts, with bills of lading for said eggs attached, were discounted to the defendant bank with the knowledge or consent or acquiescence of B. W. Redfearn, then you will find a verdict for the defendant.

"9. If the jury believe from the evidence that by the previous course of dealing between the plaintiffs and B. W. Redfearn and the Mound City Produce Company the plaintiffs shipped goods to B. W. Redfearn on consignment in St. Louis and that such goods frequently were reconsigned in St. Louis to some other point and drafts drawn and bills of lading for the reconsignment attached thereto, and such drafts discounted with such bills of lading attached in the name of the Mound City Produce Company in the bank and drafts sent to the plaintiffs for the amount of such discount, drawn by the Mound City Produce Company on itself; and that before the shipment in controversy the plaintiffs knew that their goods which were reconsigned in St. Louis were frequently drawn against, and the drafts discounted and that the proceeds were going to the credit of the Mound City Produce Company; or, if without positive knowledge of these facts, you believe that at the time of the shipments in controversy the plaintiffs had knowledge of such facts and circumstances as would have caused a reasonable man to believe that their goods were being reconsigned and drawn against and that the proceeds were going to

the credit of the Mound City Produce Company; and if you further believe from the evidence that the eggs in controversy were so shipped on consignment and were reconsigned in St. Louis and drafts drawn on the party to whom they were reconsigned and bills of lading attached thereto and said drafts discounted with the defendant bank and that the bank had no knowledge to that time that the eggs belonged to plaintiff and that it paid the amount of said discount to the Mound City Produce Company at the time in cashier's checks, then your verdict in this case should be for the defendant bank.

"10. You are instructed that it is not necessary for the defendant to prove authority from plaintiffs to the Mound City Produce Company to consign the eggs and draw against them with bills of lading attached and discount the drafts, by direct and positive testimony but such authority may be established by circumstances and previous course of dealing between the parties and hence if the jury find from the evidence that by the previous course of dealing between the parties the Mound City Produce Company frequently reconsigned merchandise sent by plaintiffs to B. W. Redfearn on consignment and drew against the same and discounted the drafts with bills of lading attached and that the plaintiffs knew of such course of dealing prior to the shipment in controversy, or had knowledge of such facts and circumstances prior to that time as would have caused a reasonably prudent man to believe that merchandise sent by them on consignment to B. W. Redfearn was being reconsigned in the name of the Mound City Produce Company and drafts discounted in the name of said company against the shipment, then the jury will be authorized to infer from such a course of dealing that said Mound City Produce Company had authority to so dispose of the shipments in controversy and if they so find the verdict should be for the defendant.

"11. If the jury believe from the evidence that the plaintiffs sent the eggs in controversy to B. W. Redfearn on consignment and that the Mound City Produce Company took the eggs and consigned the same to Rowland & Co. in New York and drew drafts on Rowland & Co. for the eggs and discounted the drafts with the defendant bank, with bills of lading attached, and received the proceeds and sent to plaintiffs drafts upon itself for the proceeds of such discount and that plaintiffs knew that said Mound City Produce Company had so done and knew at the time the Mound City Produce Company was insolvent, or likely to become so before said drafts sent to plaintiffs could be collected, or that plaintiffs had knowledge of such facts and circumstances as would cause a reasonable man to believe that the Mound City Produce Company was insolvent, or likely to become so before said drafts sent to plaintiffs could be collected and that plaintiffs took such drafts so sent them and endorsed the same and transferred them to their own bank and received credit therefor, then you are instructed that these facts constituted a ratification of the act of the Mound City Produce Company in so disposing of plaintiffs' eggs, and if you so find the facts you will find for the defendant bank, notwithstanding you may further find that the Mound City Produce Company had not been authorized by plaintiffs to so dispose of the eggs and that the drafts sent plaintiffs were never paid, and that the plaintiffs were compelled to, and did, take the same up afterwards from their own bank.

"12. With reference to the question as to whether or not plaintiffs had notice of the insolvency of the Mound City Produce Company at the time referred to in the preceding instruction, the court instructs you that it is not necessary that such notice should be proved by direct and positive proof, but that the jury have a right to infer the same from circumstances; and

if, in view of all the facts and circumstances in the case, you believe that at the time mentioned in said instruction the plaintiffs either knew the Mound City Produce Company was insolvent or would likely become insolvent before the drafts sent to plaintiffs for the two carloads of eggs in controversy could be collected, or that they had knowledge or notice of such facts and circumstances as would lead a reasonably prudent man to believe that said produce company was insolvent or would likely become so before said drafts could be presented for collection and paid, then you are instructed that such facts are equivalent to actual knowledge of insolvency and should be so treated by you, if you find the facts to so exist."

The court gave the following of its own motion:

"13. The court instructs the jury that nine of your number have the power to find and return a verdict and if less than the whole of the number, but as many as nine agree upon a verdict, the same should be returned as the verdict of the jury, in which event all of the jurors who concur in such verdict shall sign same. If, however, all of the jurors concur in a verdict, your foreman alone may sign it."

The following instructions were requested by plaintiffs and refused:

"1. By mentioning the 'burden of the proof' and 'preponderance of evidence,' the court intends no reference to the number of witnesses testifying concerning any fact or upon any issue in the case, but simply by way of briefly expressing the rule of law, which is that unless the evidence (as to such issue) appears in your judgment to preponderate in respect to its credibility in favor of the party to this action on whom the burden of proof (as to such issue) rests, then you should find against such party on said issue.

"2. The court instructs you that nine of your number have the power to find and return a verdict and if less than the whole of your number, but as many as

nine agree upon a verdict, the same should be returned as a verdict of the jury, in which event all of the jurors who concur in said verdict shall sign the same. If however, all of the jurors concur in the verdict your foreman alone may sign it.

“3. Should you find from the evidence, all the facts and circumstances, that the bank took the drafts to which the bills of lading were attached for collection only, then your verdict should be for the plaintiffs.

“4. You are instructed that before you can find the plaintiffs ratified the acts of the Mound City Produce Company in drawing drafts upon their eggs and placing said drafts in the Jefferson Bank to its own credit, you must be satisfied that the plaintiffs with full knowledge of all that was done consented to and approved of the same. Ratification is an intention to stand by or adopt what has been previously done with authority and it must appear such action or approval or intention to stand by and adopt what has been done without previous authority is done intelligently and not infer a mistake. Should you find from the evidence, the facts and circumstances, the plaintiffs were mistaken about any material fact or facts connected with the disposition of their eggs, such as a belief their agents had sold them when in fact they had not, that they believed the Mound City Produce Company was solvent when in fact it was not, then the plaintiffs could not be said to have ratified the acts of the Mound City Produce Company by anything they did while laboring under such mistaken belief. The court does not undertake to say, or in any way intimate what the evidence does or does not disclose. That is exclusively for you to do. The burden of proving such ratification, if it existed, is on the defendant.

“5. Should you find from the evidence that the plaintiffs received the drafts of the Mound City Produce Company upon itself and had them deposited to

their own credit in their bank at Fredonia, Kansas, and then the drafts were afterwards charged back to the plaintiffs by the said bank at Fredonia, these acts would not necessarily constitute a ratification on the part of the plaintiffs.

“6. Should you find from the evidence that the defendant had knowledge of the character of the accommodation or kiting drafts drawn by the Mound City Produce Company upon the Fredonia Produce Company and deposited with the defendant bank, or that the drafts were received under such circumstances as to put a reasonably prudent man on inquiry as to their character, then the bank could not have been misled by any acts of the plaintiff in relation to such paper nor would the bank be warranted in extending credit to the Mound City Produce Company under the belief that the plaintiffs would continue to pay said drafts.

“7. Should you find from the evidence that prior to the failure of the Mound City Produce Company, the plaintiffs had honored a large number of accommodation drafts drawn by the Mound City Produce Company upon the plaintiffs, this would not obligate the plaintiffs to continue the payments of such paper, but they had the right at any time to discontinue such payment.”

This case has returned on a second appeal and as we gave a complete statement of the numerous, complicated and important facts in our first opinion and ruled upon all the main propositions of law involved, we will not repeat the statement or discussion. The points raised on this appeal relate to rulings on offers of testimony and requests for instructions.

GOODE, J. (after stating the facts).—The first assignment of error is the refusal of the court, on motion of plaintiff, to discharge the special jury which had been summoned to try the case. The application and

order for the special venire are not contained in the record and we know not for what reason the court was asked to have it summoned or whether defendant's application was opposed. The record shows no objection by plaintiffs to the procedure until after *voir dire* examination of the members of the panel, the peremptory challenges by the parties and statements by counsel to the panel selected as the jury of the facts relied on for the cause of action and the defense. The motion to discharge the special jury said the statements of counsel and the pleadings showed there were "no intricate involved calculations calling for unusual preparation or skill, but the issues are based upon the questions of fact as to knowledge, title and good faith." In the motion for new trial we find the charge made that the special jury was not fairly and impartially selected, and instead was "selected with a view to contain the greatest possible number of presidents and secretaries of various corporations and the greatest possible number of German inhabitants so the defendant might obtain the benefit of any bias arising from either race or corporation prejudice." The record omits the *voir dire* examination of the panel and there is nothing before us to support the accusation of policy in summoning the jury and the probability of a bias in the members unfavorable to plaintiffs. As no abuse of the court's discretion to try the cause by the special jury appears, the exception taken to the overruling of the motion to discharge said jury will be disallowed. [R. S. 1899, sec. 6566; *Eckrich v. Transit Co.*, 176 Mo. 621, 75 S. W. 755.]

The action is for damages for the conversion by defendant of the two carloads of eggs belonging to plaintiffs, shipped by them from Fredonia, Kansas, to B. W. Redfearn in St. Louis, and accompanied by letters or invoices to said Redfearn in the following form:

"INVOICE OF SHIPMENT.**"To B. W. Redfearn,****927 North Fourth St., Saint Louis, Mo.**

306 cases of eggs stenciled F, from Fredonia Produce Company, Fredonia, Kansas, July 14, 1904. 306 cases of eggs, current receipts, transferred and topped—excelsior and extra flats. Drafts \$—. No. —. Terms, Cash on delivery of goods. Shipped via Frisco."

The second invoice was precisely like the above except the date, which was July 12, 1904, and the shipment was for 276 cases of eggs. Plaintiffs offered the invoices in evidence on the theory that the expression "terms cash on delivery of the goods" was, in effect, a limitation on the authority of Redfearn to pass the title to the property by sale or reconsignment except on receipt of the price in cash for plaintiffs. This was true as between plaintiffs and Redfearn, unless the course of business pursued by them had been in disregard of restrictions in the invoices of prior shipments. The invoices of the shipments in dispute were incompetent against defendant, for it never had seen them and hence knew nothing of the supposed restriction of the authority of Redfearn to dispose of the eggs, and as consignee in the bills of lading taken by plaintiffs from the railway company which carried the property from Fredonia to St. Louis, he might be dealt with as having complete power to pass the title. The only cloud on the title to the eggs acquired by defendant arose in this way, as will be seen by reading the former statement and opinion: The Mound City Produce Company received the eggs at St. Louis, reconsigned them to Rowland & Company in New York, took bills of lading from the Wabash Railroad Company, over which road the eggs were shipped to New York, attached these bills of lading to a draft drawn on Rowland & Company, and defendant discounted the draft. If this transaction had occurred between the

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bank and Redfearn, whom plaintiffs admit they had expressly authorized to do such acts, there would have been no doubt about the title to the eggs passing with the bills of lading. But as defendant dealt with the Mound City Produce Company, the corporation Redfearn controlled, instead of with him personally, and as plaintiffs denied said corporation had been authorized to transact business for them, it was necessary for defendant, in order to maintain its title and escape a judgment for having converted the property, to establish one of several facts regarding the transmission of the eggs to Rowland & Company for sale in New York and the assignment to defendant of the draft for their proceeds, with bills of lading attached, namely: that said acts, though done in the name of the Mound City Company were attended to or ordered by Redfearn, or Gunn or W. P. Johnson, who concededly had power to act in such affairs in Redfearn's absence, or that plaintiffs had expressly authorized the Mound City Company likewise to act as their agent, which they denied, or that authority had been conferred on it by a previous course of dealing acquiesced in by plaintiffs, or that, after all material facts were known, plaintiffs had ratified the transaction between the Produce Company and defendant by depositing to their credit in the Fredonia Bank the draft drawn on itself by the Mound City Produce Company and transmitted to plaintiffs with a letter showing it was sent to pay for the eggs. As those issues were the essential issues, the invoices with which plaintiffs accompanied the shipments of eggs to Redfearn were not relevant.

Complaint is also made of the exclusion of 159 of the "kiting" drafts for many thousands of dollars, which had been drawn by the Mound City Company and B. W. Redfearn on the Fredonia Produce Company during seven or eight months prior to and wholly unconnected with the transactions in controversy, discounted with defendant bank and afterwards paid by

plaintiffs on presentation. As is shown in the former opinion, plaintiffs had maintained the credit of Redfearn for about a year by honoring drafts of this character drawn by him and discounted with defendant. If the Mound City Company needed money it would draw such a draft on plaintiffs, get it cashed by defendant, which would send the draft to Fredonia for payment and plaintiffs would pay it, being reimbursed by other drafts drawn by the Produce Company on itself and transmitted to plaintiffs. The testimony in regard to this course of business was competent as against plaintiffs to affect them with notice of the insolvent condition of the Produce Company at the time they accepted the draft on itself for the two carloads of eggs in question and thereby make good the alleged ratification by said acceptance of the Produce Company's disposition of the eggs as their agent. The bearing of the testimony as regards the defendant is altogether different. That these 159 "kiting" drafts had been drawn on and honored by plaintiffs through many months, had no tendency in itself to prove defendant knew the Mound City Produce Company was insolvent. For aught that appears defendant had no knowledge of the real nature of the transactions or reason to believe the drafts were a scheme used by plaintiffs and Redfearn to maintain the Mound City Produce Company's financial condition, or were not drawn and paid in the usual course of exchange. As we pointed out in the previous opinion, the failure of the Mound City Company was caused by plaintiffs suddenly refusing to honor \$5500 of these drafts which had been discounted with the defendant and accepted by it on the faith of many previous transactions, in all of which plaintiffs had paid the drafts when presented. No error was committed to plaintiffs' prejudice in excluding the drafts, for standing alone they threw no light on the issues, and explained by the circumstances connected

with them conducted to prove defendant was ignorant of the insolvency of the Produce Company.

The instructions given and refused will go with the opinion. On comparing those given with the former opinion they will be perceived to declare the law in conformity to it. The first refused request of plaintiffs was covered in part by a charge given by the court, and the other paragraph defined a phrase "preponderance of the evidence," not used elsewhere in the instructions. The second refused request had no evidence to rest on and was opposed to the former decision. The third, in so far as sound and not a comment on facts, was covered by the fourth instruction granted for plaintiffs. The fourth refused request was a comment on two facts singled out from various facts bearing on the question of ratification. The fifth and sixth sought to introduce the alien and immaterial issues of whether defendant had been misled by plaintiffs paying many kiting drafts not connected with the eggs in dispute, and of whether plaintiffs were bound to continue to pay such drafts. The evidence regarding those occurrences was admitted only as proof of plaintiffs' knowledge of the Produce Company's insolvency and not to establish the affirmative of the hypothesis mentioned in the refused requests.

The judgment is affirmed. All concur.

ROBERT McCLARIN, Respondent, v. MAX GRENZFELDER, Appellant.

St. Louis Court of Appeals, March 22, 1910.

1. **PHYSICIANS AND SURGEONS: Negligent Treatment: Liability of Physician.** The fact that a mode of treatment by a physician produced the injuries for which suit was brought would not necessarily lay the physician liable, if such method was a regular and approved method of treating the ailment, for untoward results sometimes follow the most scientific surgery.
2. ———: ———: ———: **Jury Question.** In an action against a physician for negligence in treating plaintiff for hernia, *held*, there was proof the injuries complained of might have been caused by the treatment and proof that the treatment was improper, and hence the case was properly submitted to the jury.
3. ———: **Care Required: Specialists.** A physician, holding himself out as a specialist in treating hernia, is bound to use that degree of care and skill possessed by hernia specialists in the city where he practices or in other cities following the same or more advanced methods of treatment, or by physicians making a special study and practice of the disease, so as to give them more skill and experience in treating it than possessed by general practitioners.
4. ———: **Negligent Treatment: Liability of Physician: Following Recognized System of Treatment.** In ascertaining where the requisite skill and care were employed by a physician in a given case, contemporary knowledge of the ailment and how to relieve it are considered. If expert practitioners of the physician's school agree in opinion about the right method of treating the particular disease and the physician adopts a method not recognized as sound, his conduct should be regarded as an experiment, which renders him liable if it injures the patient; but if the physician's system of treatment is recognized as proper, although other systems also are recognized as proper, he cannot be convicted of negligence if he made use of the one he deemed most suitable for the patient's case, and the question of his responsibility, in that event, would turn on whether he had administered the remedy preferred by him with the degree of care and skill required of a person holding himself out as an expert, and the fact that it was of comparatively recent origin would not *ipso facto* put it in the class of innovating experiments so as to lay him liable for a bad result.

McClarín v. Grenzfelder.

5. **DAMAGES: Instruction: Conformity to Evidence.** Where, in an action against a physician for damages for negligent treatment, there is no proof of permanent injury, the instruction on the measure of damages should not submit that question.

Appeal from St. Louis City Circuit Court.—*Hon. Moses N. Sale*, Judge.

REVERSED AND REMANDED.

Wm. R. Gentry and Watts, Williams & Dines for appellant.

(1) The sole and only specification of negligence contained in the petition is as follows: "Negligently and carelessly injected into the parts affected a preparation which formed a waxy substance and resulted in an inflammation of the intestines." Plaintiff having alleged this ground of negligence in his petition, is bound by it and cannot recover upon any other ground. *Goodwin v. Herson*, 65 Me. 223; *Mayo v. Wright*, 63 Mich. 32; *Jacobs v. Cross*, 19 Minn. 523; *West v. Martin*, 31 Mo. 375. (2) Where the evidence is as consistent with the absence of negligence as it is with the existence of negligence, the case should not be submitted to the jury. *McQuay v. Eastwood*, 12 Ont. 402; *Havens v. Hardesty*, 18 Ohio Cir. Ct. 891; 9 Ohio Cir. Dec. 850; *De Long v. Delaney*, 206 Pa. St. 226. And a verdict for plaintiff on a record like the present one should have been set aside. *Winner v. Lathrop*, 67 Hun (N. Y.) 511, 22 N. Y. Sup. 516; *Feeney v. Spalding*, 89 Me. 111; *Neifert v. Hasley*, 149 Mich. 232; *Staloch v. Holm*, 100 Minn. 276; *Wood v. Wyeth*, 94 N. Y. Supp. 360; *Mackenzie v. Carman*, 92 N. Y. Supp. 1063; *English v. Free*, 205 Pa. St. 624; *Bigney v. Fisher*, 26 R. I. 402; *Wurde mann v. Barnes*, 92 Wis. 206. (3) Negligence under the allegations of the petition is limited to the question as to whether or not the injection of the paraffine into the muscular wall of the

abdomen was negligent. This negligence, if it existed, must consist: 1. In the adoption of this method instead of other methods, or 2. In the manner of its use. The petition does not rely or declare on an express promise to cure, but it is restricted to one or the other of these grounds. *Vanhooser v. Berghoff*, 90 Mo. 487. (4) A physician or surgeon undertaking the treatment of a patient is not required to exercise the highest degree of skill possible; he is only required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by members of his profession in good standing, practicing in similar localities. *Simonds v. Henry*, 39 Me. 155; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388. No particular school of medical practice is preferred by the law; and when a practitioner is called in his treatment is to be tested by the general doctrines of his school and not by those of other schools. *Patten v. Wiggín*, 51 Me. 597.

John M. Dickson, R. E. Blodgett and Glendy B. Arnold for respondent.

Defendant is a practicing physician in the city of St. Louis, graduate of the Marion Sims Medical College, adherent of the allopathic or regular school of medicine and devoted especially to the treatment of hernia—a condition in which a portion of the bowel protrudes through an opening in the peritoneum or covering of the abdominal cavity. The hernia, some witnesses say, is due to the enlargement of a natural orifice in the abdominal wall and the enlargement may be congenital, caused by heavy lifting, or in other ways. Defendant advertised in the newspapers as a specialist in the treatment of hernia, plaintiff read the advertisement, and as he had been suffering from hernia for some time, visited defendant to be treated. Plaintiff was employed at the time as a workman in a large wholesale hardware establishment in St. Louis and did

much lifting. He said he was in good health and strong when he first called on defendant December 30, 1906. Defendant then examined him and said he (defendant) could cure plaintiff in thirty minutes and without causing plaintiff to lose time from work. No treatment was administered at the first visit, but plaintiff was told to come back on January 6th and he would be treated, on which day he returned and defendant injected into his right groin over the hernia some aseptic paraffine. The theory of the practice was that this paraffine, after it was injected into the middle of the muscle outside the abdominal cavity and the peritoneum, would form into a compact mass over the hernia, and close and hold closed the orifice in the peritoneum so the bowel could no longer protrude; or possibly hold the bowel in place until the orifice had contracted enough to prevent protrusion. This treatment was administered to plaintiff on January 6th and he was pronounced cured, but says he suffered great pain at the time and continued to suffer pain from then on until he was operated on for peritonitis four or five months later in the city hospital. Plaintiff visited defendant several times after the operation, perhaps every Sunday until he was taken to the hospital, said he complained each visit of his suffering and of a lump in the groin where the syringe had been inserted, but received no attention from defendant other than advice to wear an old suspender across the groin as a truss, which he did without obtaining relief; that defendant declared at every visit he (plaintiff) was cured and was getting along all right. There is little difference between the testimonies of plaintiff and defendant. The latter said plaintiff's frequent visits after the operation were to pay installments of the fee due defendant, that he did not advise the wearing of a suspender but of a truss, that plaintiff was cured by the operation and never complained at any subsequent visit until the last one,

when he called defendant's attention to a small protuberance or swelling of the groin which was of no consequence, and defendant told plaintiff he would open it on plaintiff's next visit, but there was no other visit. From the latter part of March to the end of April, plaintiff was able to work only from three to five days a week, he said, and by May was unable to work any, had to take to his bed and the waxy fluid had moved around to the outside of his stomach. He called a physician, Dr. Fuchs, who prescribed a powder to relieve pain; plaintiff was taken to the city hospital on May 7th, on his arrival there was found to be suffering from peritonitis or inflammation of the peritoneum and was immediately operated upon; he was then emaciated, was vomiting a dark-brown fluid, his abdomen was distended, and there was a partial obstruction of the bowel due to the adhesion of the intestines to the wall of the abdomen on the right side, so as almost to prevent the passage of fecal matter. This was strangulation of the bowels and not strangulated hernia. Plaintiff was cut open a little below the hernia which existed at the time, black spots as large as a finger-tip were found on the bowels, and the physician who performed the operation, Dr. G. W. Shanklin, testified he discovered on May 7th, near the hernia, a mass of paraffine the size of a pigeon's egg, but did not know what it was, nor did he interfere with it then, because he was intent on relieving the peritonitis. Plaintiff recovered from that disease completely and on June 6th, Dr. Shanklin operated on him for hernia. The operation consisted of cutting into the belly by the side of the hernia, placing the hernia sack back in its natural position and closing the orifice it had protruded from. During the second operation the surgeon examined the lump in plaintiff's groin, found the tissues matted together and small particles of paraffine scattered through the tissues, most of it being in the muscles, it having gone through the muscle covering to some ex-

tent, but not into the peritoneum. This expert testified there were many causes for peritonitis, such as a blow on the abdomen or the extension of inflammation from the appendix where inflammation may be set up by germs or particles of food lodging; that a foreign object in contact with the peritoneum inflames it and the inflammation in plaintiff's peritoneum might have occurred from the paraffine; "it was in a position where inflammation might have occurred from the contact of the paraffine with the peritoneum." This question and answer are in the witness' testimony:

"Q. Now, Doctor, if the paraffine pressing against the peritoneum caused the peritonitis, you cut in there at this first operation and did not remove the cause, that is the inflammation resulting from the pressure of the paraffine; how came you to say that the paraffine was the cause if he got well? A. I didn't say that was the cause."

He said the acute condition of plaintiff found when he first operated, might have been caused by the paraffine or by something else; that the paraffine was there in evidence and the appendix was not diseased. He also said he had heard of the employment of the method of treatment used by defendant to reduce hernia, but was not familiar with it and it was not the usual or ordinary method of treating hernia. At the second operation Dr. Shanklin found the hernia orifice unclosed and part of the bowel down, which might have caused strangulation of the bowel, and there was a mass of paraffine there. Defendant testified plaintiff looked sick when he first visited defendant and was suffering from inguinal hernia; defendant told plaintiff he (defendant) could effect a cure in half an hour, treated plaintiff, cured him in thirty minutes and discharged him as cured; the treatment (*i. e.*, the medicine) defendant administered could not go into the abdomen and did not come in contact with the peritoneum; he had administered the same treatment to hundreds of people and

had never known, in his own practice or that of other physicians, peritonitis to result from it; the treatment was used in Chicago, Cincinnati, and in Vienna, Austria, where it was developed about nine years ago by Dr. Gerizunde; it had been very successful and defendant had heard of it being used recently in St. Louis by other physicians, but at the time he treated plaintiff he did not know that it was used by other physicians; the fluid injected into plaintiff had been rendered absolutely aseptic; defendant would not say he cured every case of hernia he had ever treated, but he had cured many cases. Dr. Alfred Luebbers testified he was a regular physician, a graduate of Marion Sims College, practiced in the allopathic school, had been practicing since 1896, knew defendant and had assisted him in several operations for hernia. He described the method of treatment as it has been described supra, said he was present when defendant operated on plaintiff and before plaintiff left the office the witness and defendant tested him to see if the hernia was cured; the test was by putting a finger against the abdomen and having the patient cough; if the bowel came down under these circumstances, the hernia was not cured; if it did not, the hernia was cured; plaintiff was found to be cured; witness said there were other methods of treating hernia, both by surgery and by injections of fluids other than the one defendant used; he did not know of any probability of a pad formed by the paraffine giving way; there was no possibility of the substance passing through the abdomen; most physicians in treating hernia used surgical operations. Three witnesses testified for defendant they had been cured of hernia by the treatment administered to plaintiff and no harmful result followed. The court declined all the requests for instructions preferred by both parties, including one by defendant for an order to return a verdict in his favor, and in lieu of the requests gave instructions of the court's own motion. The substance

of the first two was that if defendant held himself out as expert in the treatment of hernia and rupture and undertook to treat plaintiff for hernia, it was defendant's duty to exercise ordinary care and skill as explained in the instructions, and if the jury believed the method and manner of treatment used by defendant while treating plaintiff were "not used by physicians and surgeons of ordinary skill and care, and as a direct result of the use of such method the plaintiff suffered the injury of which he complains, then your verdict should be for the plaintiff;" that ordinary skill and care, in the sense of the instructions, meant such skill and care as were used by physicians and surgeons of ordinary ability in the same locality or similar localities and under the same or similar circumstances, and failure to exercise such skill and care in any given case constituted negligence; that if defendant undertook to treat and cure plaintiff and did so successfully and thereafter plaintiff suffered from peritonitis from some other cause not connected with defendant's treatment, then plaintiff was not entitled to recover; which charge, in effect, was the same as one requested by defendant and refused. The court further instructed if the jury found the injury complained of might be ascribed to one or the other of several causes not arising out of or caused by any negligence or want of skill on the part of defendant, the verdict should be in his favor; that if different methods of treating hernia were recognized as proper by physicians and surgeons of ordinary skill, it was not negligent in defendant to have used any method so recognized, and the fact some other method existed did not tend to prove defendant was negligent, "provided you find from the evidence that the method actually used was proper and recognized as such by surgeons of ordinary skill and education;" that to recover plaintiff was bound to establish by the greater weight of testimony: First, defendant did not act with ordinary skill as explained in the in-

structions; second, such failure to exercise ordinary skill resulted in the injury to plaintiff of which he complains; third, said injury was directly caused by failure to use ordinary skill and not from some other cause. If the issues were found for plaintiff, the jury were told to take into consideration in estimating his damages the physical injury inflicted, whether temporary or permanent, and the bodily and mental anguish endured, and assess the damages at such sum as would compensate him for said injury, together with the suffering caused by it. A verdict was returned in plaintiff's favor and awarding him damages in the sum of \$2000.

GOODE, J. (after stating the facts).—Though the petition avers defendant advertised he could cure hernia in thirty minutes without cutting and plaintiff employed him to treat and cure plaintiff and defendant undertook to do so, it does not declare on the alleged promise, say the hernia was not cured nor ask damages for failure to cure it. The gravamen of the case presented is "defendant so negligently and unskillfully conducted himself in and about treating said hernia, that through and by reason of his negligence and unskillfulness, plaintiff was made exceedingly ill and his life placed in danger, so that it became necessary for him to go to a hospital and undergo a painful and dangerous surgical operation to preserve his life and restore him to health; . . . that defendant in his attempt to cure plaintiff, negligently and carelessly injected into the parts affected a preparation which formed a waxy substance and resulted in an inflammation of the intestines, necessitating an operation for the saving of the life of plaintiff."

Error is assigned for the court's refusal to direct a verdict for defendant, the contention being there was no proof his treatment of plaintiff was improper, or, if it was, that it induced the peritonitis plaintiff suffered from months afterward. The affirmative of those

issues is supported by scanty evidence and we wish more light had been shed upon the case by the testimony of experts. Defendant and another physician who aided him in the first treatment of plaintiff gave testimony which tended to prove the method was both proper and skillfully administered. Taken in its entirety the testimony of Dr. Shanklin, who was the only expert introduced by plaintiff, points rather weakly to the conclusion that the paraffine in the abdominal cavity caused the peritonitis. Doubt is cast on this theory by the paraffine not being in contact with the peritoneum, and the complete cure of the peritonitis before the paraffine was removed. Moreover, the injection of it, if a regular and approved method of treating the ailment, would not necessarily lay defendant liable even if it induced the peritonitis, for untoward results sometimes follow the most scientific surgery. On the whole more evidence on the main issues of fact is desirable, but as there was proof the peritonitis might have been caused by the wax, and some evidence tending to prove the injection of it was not a right way to treat hernia, we endorse the submission of the case to the jury.

In one aspect the instructions were too favorable to defendant and in another were likely to mislead the jury to his detriment. Because defendant held himself out as an expert in the treatment of hernia, the law required him to treat plaintiff with the skill and care commonly shown by physicians and surgeons in St. Louis and cities in advance or abreast of it in the practice of medicine and surgery, who devote special study to the treatment of the disease; that is to say, the proficiency and skill of hernia specialists; not meaning by this designation only physicians who treat that disease exclusively, but also those who by special study and experience probably have acquired more accurate knowledge of the right methods of treatment than is possessed by general practitioners of medicine. [5 Thompson, Negligence, section 6714; McMurdock v.

Kimberlin, 23 Mo. App. 523, 531; Rann v. Twitchell, 20 L. R. A. (n. s.) 1030.] And in ascertaining whether the requisite skill and care were employed in a given case, contemporary knowledge of the ailment and how to relieve it are considered. [Rann v. Twitchell, *supra*; Gillette v. Tucker, 67 Oh. St. 106, 93 Am. St. Rep. 639, 660, note b.] If expert practitioners of defendant's school concurred in opinion about the right method of treating hernia and defendant adopted a method not recognized as sound, then, according to courts which have passed on the question, his conduct should be regarded as an experiment which renders him liable if it injured plaintiff in the way alleged; that is, caused peritonitis. [Carpenter v. Blake, 60 Barb. 488; Patten v. Wiggin, 51 Me. 594; Jackson v. Burnham, 20 Colo. 532, 1 Colo. App. 237; Pike v. Honsinger, 155 N. Y. 201, 210; Allen v. Voje, 114 Wisc. 1; Whitesell v. Hill (Ia.), 37 L. R. A. 830, 836, note 6.] But if defendant's system of treatment was recognized as proper, then, though there were other systems recognized as proper, he cannot be convicted of negligence if he made use of the one he deemed most suitable for plaintiff's case. [Wells v. Medical Assn., 9 N. Y. S. R. 452.] In such a condition of medical science, the question of defendant's responsibility would turn on whether he administered the remedy preferred by him with the degree of care and skill required of a person holding himself out as an expert.

What we are dubious about is whether the evidence for defendant conduced to prove the treatment he used was recognized by the experts of his school as proper for the relief of hernia. That it was of comparatively recent origin ought not, *ipso facto*, to put it in the class of innovating experiments, so as to lay the defendant liable for a bad result, even though he displayed reasonable skill and care in the manner of applying it. This is true because some of the most approved systems of treatment, like antitoxin for

diphtheria,, met with general acceptance by the medical profession a few years after their discovery. We conclude there was enough evidence for defendant on this point to remit it to the jury.

The theory carried through the instructions was that defendant was only required to possess and exercise the skill and care exercised by physicians of ordinary skill and ability in localities like St. Louis, whereas we think he was bound to exercise the care of a specialist, and that the propriety of his treatment was to be determined with reference to the practice and approval of specialists. It may be the system was recognized, approved and used by physicians who had kept pace with scientific progress in relieving hernia, but "was a method or manner of treatment not used by physicians and surgeons of ordinary care and skill," as the first instruction reads.

We have not found any proof in the record plaintiff was permanently injured by defendant's treatment and unless on another trial there is such evidence, it would be well to omit in the instruction on the measure of damages, reference to permanent injury.

The judgment is reversed and the cause remanded. All concur.

WERTHEIMER, SWARTZ SHOE COMPANY, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, March 22, 1910.

COMMON CARRIERS: Negligence: Destruction of Goods: Flood: Act of God: Proximate Cause: Facts Stated. The waters of rivers had been gradually rising for several days until the night of May 30th, threatening to inundate railroad tracks on which goods were standing, and the weather office and newspapers had sent out warnings of danger. Similar overflows had occurred before without damaging property, and similar warnings had been given by the weather office. On May 31st, an unforeseen,

unprecedented and overwhelming flood occurred. The flood was unexpected even by the government weather officials, and the goods which had not been removed from the yards were destroyed. *Held*, that the loss was due to the flood, and not to the railroad's failure to remove the goods to a place of safety.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

REVERSED AND REMANDED (*with directions*).

Robert T. Railey and *James F. Green* for appellant.

(1) The action of the court in sustaining a motion for a new trial is subject to review on appeal. *Millar v. Car Co.*, 130 Mo. 517; *Candee v. Railroad Co.*, 130 Mo. 154; *Taylor v. Architectural Co.*, 47 Mo. App. 257; *Kuenzel v. Nicholson*, 73 Mo. App. 14; *Valois v. Warner*, 1 Mo. 730. (2) Upon the uncontradicted testimony, the judgment should have been for the defendant, and the court therefore erred in setting aside the verdict in favor of defendant. *Merritt v. Railroad*, 122 S. W. Rep. 322; *Moffatt v. Railroad*, 113 Mo. App. 544; *Mfg. Co. v. Railroad*, 117 Mo. App. 453; *Lightfoot v. Railroad*, 126 Mo. App. 532; *Cattle Co. v. Railroad*, 135 Fed. Rep. 135; *Rogers v. Railroad*, 75 Kansas 222; *Grier v. Railroad*, 108 Mo. App. 565; *Elam v. Railroad*, 110 S. W. 602; *Hay Co. v. Railroad*, 113 Mo. App. 651; *Brewing Assn. v. Talbot*, 141 Mo. 686.

David Goldsmith and *Karl M. Vetsburg* for respondent.

(1) The plaintiff's motion for a new trial should be sustained because the verdict of the jury on the third count is inconsistent with that under the first count. *Chicago Co. v. Stepp*, 88 N. E. 343; *Phillips v. McDonald*, 2 Mill Const. 269; *Raymond v. Kiseberg*, 84 Wis. 302, 19 L. R. A. 643; *Everroad v. Gabbert*, 83

Ind. 489; Crawford v. Stock Yards, 215 Mo. 394; Chlanda v. Transit Co., 213 Mo. 262. (2) The court erred in its rulings on the instructions offered by the plaintiff with respect to the third count and in the instructions given by it of its own motion under that count. Plaintiff's motion for a new trial should therefore be sustained. Warehouse Co. v. Railroad, 124 Mo. App. 545; Merrett v. Farle, 29 N. Y. 115; Steamboat Co. v. Tierrs, 24 N. J. L. 697. (3) Plaintiff's motion for a new trial should be sustained because the court erred in admitting evidence as to the conduct of other persons having places of business in the west bottoms. Grier v. Railroad, 108 Mo. App. 574; Koons v. Railroad, 65 Mo. 597; Kelley v. Parker-Washington Co., 107 Mo. App. 495; Jenkins v. Hooper, 13 Utah 103; Hill v. Prov. S. Co., 125 Mass. 292; East Tenn. v. Kane, 92 Ga. 187; Railroad v. Clark, 108 Ill. 113; Calf v. Railroad, 87 Wis. 276; Gardner v. Friederich, 25 N. Y. App. Div. 528, affirmed 163 N. Y. 568; Calamet v. Crentz, 80 Ill. App. 96; Hill v. Windsor, 118 Mass. 259; Grand T. v. Richardson, 91 U. S. 469. (4) Plaintiff's motion for a new trial should be sustained because the verdict is against the weight of the evidence. Under the testimony, the verdict on both counts should have been for plaintiff. Memorandum of Trial Judge, rec. p. 220; Railroad v. Madden, 103 S. W. 1193; Fentiman v. Railroad, 44 Tex. Cir. Rep. 462; Pinkerton v. Railway, 117 Mo. App. 293.

GOODE, J.—Plaintiff filed this action to recover for the loss of two shipments of boots and shoes, the first consisting of five cases delivered on May 25, 1903, to defendant for carriage from St. Louis to Chapman, Kansas, there to be turned over to Carroll Brothers, and alleging the total loss of said goods. There is a second count with which we are not concerned, as the cause of action was dismissed. A third count alleged delivery to defendant on May 26, 1903, of four cases of

boots and shoes, to be carried from St. Louis to Kansas City and delivered to John Carroll. It was averred defendant failed to deliver these goods, to plaintiff's damage in the sum of \$707.43. To both the first and third causes of action defendant pleaded the goods were destroyed by a sudden and unprecedented flood of water from the Kaw and Missouri rivers, the first shipment having been turned over to the Union Pacific Railroad by defendant before its destruction and the second shipment being still in defendant's hands, because the flood occurred before defendant had an opportunity to deliver them to the consignee. Both consignments of goods were in the railroad yards at the Union Station in Kansas City, Missouri, when they were suddenly submerged by a flood of such unprecedented magnitude, that plaintiff concedes it was an act of God for the consequence of which defendant is not liable. But plaintiff contends the destruction of the property was not due entirely to the flood but is partially to be attributed to the negligence of defendant in omitting to put the property in a place of safety, though it is said there was ample time to do this while the flood was swelling and before it reached the property. The court below left it to the jury to say whether the loss was due exclusively to the sudden rise of the waters, or defendant had notice of their rising and the attendant danger in time to have removed the property to where it would be safe. The jury returned a verdict for plaintiff on the first count of the petition, assessing his damages at \$90.60, and a verdict for defendant on the third count. The court set this verdict aside on plaintiff's motion and granted a new trial on the ground the finding on the third count was inconsistent with the finding on the first count. In connection with its order sustaining the motion for new trial, the court filed a memorandum saying proper rulings had been made on the requests for instructions and no substantial error to the prejudice of plaintiff had been com-

mitted in admitting evidence; that substantial justice had not been done, the verdict on the two counts being inconsistent and the diverse results reached by the jury having no warrant in the slight difference in the evidence bearing on the respective counts; saying further, that while the court was not bound to be satisfied with the verdict of the jury, in order to sustain it, the due administration of justice would best be advanced in the present case by the exercise of reasonable discretion to grant a new trial. This appeal is from the order setting aside the verdict and allowing a new trial; and defendant contends against the adequacy of the reason assigned by the court for its ruling and in favor of the proposition that the evidence showed no cause for a verdict against the defendant on either count of the petition.

Back of the inquiry regarding the sufficiency of the reason for which the verdict was set aside, lies the question of whether a verdict should have been ordered for defendant on both counts, as it contends; and after an attentive study of the record we are convinced this contention is just. It would seem to be superfluous to rehearse the facts of the flood which caused the loss, for they have been set forth in several opinions upon cases the circumstances of which did not differ from those before us. In the following actions instituted by the owners of property destroyed in the flood to recover damages from railroad carriers, the fact supposed to show negligence was failure to remove the property beyond the reach of the waters after warnings from the Weather Office in Kansas City and newspaper reports that danger was to be apprehended by the overflow of the Missouri River bottom where the railroad yards were; the very omission of duty supposed to lay defendant liable in the present case: *Lamar Mfg. Co. v. Railroad*, 131 Mo. App. 115, 110 S. W. 601; *Id.*, 117 Mo. App. 453, 93 S. W. 851; *Lightfoot v. Railroad*, 126 Mo. App. 532, 105 S. W. 483; *Moffitt Com. Co. v.*

Railroad, 113 Mo. App. 544, 88 S. W. 117; Merritt Creamery Co. v. Railroad, 122 S. W. 322; Empire State Cattle Co. v. Railroad, 135 Fed. 135, 210 U. S. 1. In those cases the respective defendants had read bulletins of the Weather Office and newspaper reports of rising waters which threatened to inundate the bottom and the railroad tracks. This rise had been gradual for several days and was due to heavy rains over the States of Missouri and Kansas having swollen the Missouri and Kansas rivers. But similar overflows had occurred before in the river bottom at Kansas City without damaging property, and similar warnings had been given by the weather office. On May 31st an overwhelming flood occurred there in consequence of a vast volume of water pouring from the Kaw river in a torrent strong enough to turn back the current of the Missouri river and cause that stream to flow for a few miles towards its source. This flood was unexpected even by the official in charge of the government weather office in Kansas City, as he testified. The witness said he had sent out bulletins and warnings to railroad companies and others from day to day as the waters rose, giving notice of danger, but the flood stage of thirty-five feet was unexpected. We quote:

"It was extraordinary and unusual and unprecedented, excepting so far as the record of 1844 was in evidence. Does that cover it?

"Q. Well, was the height which the river attained at that time unexpected? A. Yes, sir; I said that thirty-five foot stage was unexpected.

"Q. So, then, that was an unexpected, sudden, unusual and unprecedented flood, wasn't it? A. It was. . . . When I say that was an unexpected flood—it was not an unexpected flood, because I would not have sent out the warnings if it was an unexpected flood; but the thirty-five foot stage was an unexpected stage.

"Q. Here is what I mean, Mr. Connor; the flood, as it existed when it was at its height, was that an unexpected, unusual and unprecedented flood? A. The flood at its highest? . . . Yes, sir."

He said further no one was notified by telephone of the approach of the flood down the Kaw because the weather office was handicapped by not having reports from along that river. The magnitude and suddenness of the inundation is shown by the testimony of all the witnesses and we will copy an excerpt from what one said to enable the reader to realize the nature of the catastrophe:

"The Rock Island and Union Pacific yards had been wholly or partially under water for some days—that is, many of their tracks. That is a condition that had been there a great many times; and no particular alarm was felt about that. But on the 30th the water backed into our cypress yard, and it then got into the lower parts of our State-Line yards through the stock yards, just sufficient to cover the rails in places, and it had worked up the street in front of our warehouse. The rise was very gradual and almost imperceptible. It took a great many hours for it to advance a half a block in the street. And that was the condition when I left my office at about seven o'clock on the night of May 30th; but during that night some heavy flood up in the Kaw valley, on the tributaries of the Kaw, caused the water to come down in such volume as to wash everything before it; just practically like a dam had burst and brought down a great amount of rubbish, houses, boxes, animals, and everything you can conceive, and it came along so swiftly that our engines moving the cars were just 'killed' wherever they were and the fires put out. The engine fires were put out by the water and the engine crews had to jump off and run to places of safety and get out of the bottoms or climb upon something. The street railway company ran their cable trains through the bottoms so everybody could grab the

cable and get out as it went by. Many did not get out and were drowned. Many animals were drowned. The water continued to rise very rapidly from that time until Monday noon, June 1st, I think, was the highest it got, and it slowly receded, but it was many days before it went down so we could get into the bottoms again."

All the business houses in the bottom were overflowed and thousands of dollars of property, including machinery, merchandise, farming implements and cattle destroyed. People had not thought of removing their property, as it did not occur to them the flood would reach the height it was carried to by the rush of waters from the Kaw. We could not hold a case was made against defendant without disregarding the decisions of the courts cited, *supra*, and the justice of the controversy. We do not deem it necessary to treat the law of the subject, for that is done thoroughly in said cases and our views were expressed in *Grier v. Terminal Assn.*, 108 Mo. App. 548, 84 S. W. 170. See, too, *Am. Brew. Assn. v. Talbot*, 141 Mo. 674, 42 S. W. 679.

The judgment is reversed and the cause remanded with a direction to set aside the order sustaining the motion for new trial, reinstate the verdict for defendant on the third count of the petition and enter judgment in accordance with the verdict returned by the jury. All concur.

**J. P. LASWELL et al., Respondents, v. NATIONAL
HANDLE COMPANY, Appellant.**

St. Louis Court of Appeals, March 22, 1910.

1. **SALES: Contracts: Construction: Performance.** A contract of sale of the output of a mill for a fixed period, binding the buyer to take the output and to pay cash f. o. b. cars and stipulating for inspection at the mill, does not require the seller, in view of the course of business between the parties that the seller should not load until receiving shipping directions, to load on cars before receiving such directions, and where the buyer fails to give directions, the omission to load on cars does not defeat a recovery by the seller.
2. ———: ———: ———: **Performance.** But if the seller refuses to load, on receiving shipping directions, he fails to perform.
3. ———: ———: ———: ———. If a letter containing shipping directions was sent by the buyer but not received by the seller, and a little more than a month afterwards the seller wrote for advice and the buyer, though receiving the letter, failed to give directions, he was in default.
4. ———: ———: **Action for Breach: Specious Defense.** In an action for breach of a contract in refusing to accept and pay for goods, a defense that defendant did not take and pay for the goods because they were not loaded on cars as provided in the contract is specious, where defendant never took such a position in correspondence about the matter, but evaded taking any position, and later declared it was not bound to accept the goods because they were of a kind not mentioned in the contract.
5. **TENDER: Unnecessary, when.** A tender is unnecessary where the person to whom it should be made has shown that he will refuse it if made.
6. **SALES: Contracts: Action for Breach: Refusal to Accept Goods: Evidence: Inferences.** Where the owner of a mill entered into a contract with another whereby the former agreed to sell and the latter to buy the entire output of the mill, and the latter refused to accept and pay for a certain quantity of the output, and the mill was thereupon closed down, evidence, in an action for loss of profits that would have been made if the

contract had been carried out, that though plaintiffs were in debt, they could and would have borrowed money and thus have continued to operate the factory, but that defendant's behavior induced them to believe it would take no more deliveries, especially of a certain kind, as a result of which plaintiffs were deterred from manufacturing and finally after futile efforts to get defendant to accept the refused material were caused to cease offering to manufacture, was sufficient to warrant an inference that the cessation to manufacture was due to the refusal of said material and the well-founded belief of plaintiffs no such material would be accepted, rather than to inability to operate for lack of means or for lack of the price of the rejected material.

7. ———: ———: ———: ———: ———: ———. In such a case the jury might find from defendant's conduct in giving no shipping directions for certain material after it had passed inspection with other material, although often requested so to do by plaintiffs, that defendant had refused to accept and pay for said material.
8. ———: ———: **Construction: Reasonable Time for Performance.** Where a contract for the sale of the output of a mill stipulated for inspection at the mill and for cash payment, without fixing the time for inspection or payment, both parties were bound to rest content with reasonable conduct.
9. ———: ———: **Breach: Recovery of Unearned Profits.** A seller of the product of his mill for a specified time cannot recover unearned profits on the buyer's breach, unless the latter's conduct sufficed in contemplation of law to prevent the seller from further performance.
10. **CONTRACTS: Recovery Notwithstanding Non-Performance.** A party may be prevented from keeping a contractual obligation and yet remain entitled to the full benefits he would have derived from keeping it, if the other party renders it impossible for him to keep it, or directs him to desist from performance, or fails to keep a condition precedent, or expressly renounces the contract, or breaches covenants of such importance that the breach is equivalent to a renunciation.
11. ———: ———: **Effect of Obligor's Failure to Pay Money Due.** The prevalent rule is, that mere failure to pay money when due will not warrant him to whom it is due to no longer keep his engagement and permit a recovery as though he had.
12. ———: **Construction: Dependent Stipulations.** Stipulations in commercial transactions are generally treated as dependent and indivisible on the theory that such construction conforms to the

intention of business men who are accustomed to depend on prompt compliance with engagements and may be ruined by tolerating breaches.

13. **SALES: Contracts: Recovery Notwithstanding Non-Performance.** Where a seller of the output of his mill for a fixed period for delivery f. o. b. cars, terms cash and inspection at the mill, went in debt for his mill, machinery and timber, solely on the faith of the contract of sale, expecting to meet his liabilities with the money collected on installments of the output delivered, but did not insist on a proviso that carloads should be inspected and taken at stated intervals or to make those acts conditions precedent to further deliveries, the failure of the buyer to take and accept promptly a single carload would not of itself excuse the seller from going ahead and yet enable him to recover future profits.
14. ———: ———: ———. Where a contract of sale of the output of a mill for a fixed period is broken by the buyer, and the breach evinces an intention not to be bound by the stipulations whose non-observance will so far defeat the consideration for which the seller entered into the contract that to make the seller keep the agreement will amount to coercing him to perform on terms which he would not have accepted, he is released from his obligation, and may recover as though the contract had been carried out.
15. ———: ———: ———: **Facts Stated.** A contract for the sale of handles to be manufactured by the seller during a fixed period called for a variety of handles including one called "D-stem." During a part of the period the seller manufactured and delivered several carloads of handles of the varieties called for. A carload composed of 37,000 handles, of which 22,000 were D-stems, was not taken by the buyer, on the ground he was not obliged to take handles of the D-stem variety. Performance of the contract by the seller without manufacturing D-stem handles would entail on him a continual loss, as a proportion of every load of timber worked up would be wasted. *Held*, that the buyer's renunciation of its obligation to accept D-stem handles went to the root of consideration, amounted to an abandonment of the contract, and relieved the seller from his obligation further to perform.
16. ———: ———: **Breach: Measure of Damages.** Where a contract of sale of the output of a mill for a fixed period is so breached by the buyer as to release the seller from his obligation to perform, the measure of the seller's damages is the difference between the cost to him of manufacturing the goods and loading them on cars, as required by the contract, and the prices he was to receive for the goods.

17. **PLEADING: Reply: Joining Equitable and Legal Defenses in Same Count.** The joinder of a legal and an equitable defense in a single count of a replication is bad pleading.
18. **TRIAL PRACTICE: Reply: Equitable Defense: Asking Affirmative Relief: Hearing by Court.** Where defenses of a legal and one of an equitable nature are united in a single count of a reply, and affirmative relief in connection with the equitable defense is prayed, that matter should be heard and determined by the court.
19. **PLEADING: Election.** Where a reply to a counterclaim in an answer, which counts on the breach of a contract, pleads fraud in the procurement of the contract, as an equitable defense, and the non-performance of a condition precedent, as a legal defense, both defenses resting upon the same facts, only the defense which is best supported by the evidence ought to be insisted upon.
20. **SALES: Contracts: Condition Precedent.** A statement made by one party to a contract to the other party, that if the latter would sign it, he would take certain material from the latter, was not a condition precedent, so as to make the contract ineffective until the agreement had been complied with, there being no stipulation the contract should not go into effect until this agreement had been complied with.
21. **———: ———: Rescission: Fraud.** Where one party to a contract makes a promise to the other party of something to be done in the future, with no intention to perform it, but with a fraudulent design to obtain the contract by giving the promise and breaking it, the adverse party may rescind on the ground of fraud.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

REVERSED AND REMANDED (*with directions*).

Faris & Oliver for appellant.

(1) The court erred in refusing to admit relevant and competent testimony offered by the appellant. *Type Foundry v. Printing Co.*, 3 Mo. App. 149; *Strother v. Lumber Co.*, 200 Mo. 647. (2) The court erred in admitting irrelevant and incompetent testimony offered by the plaintiffs. The plaintiffs were

permitted to say over the objections of defendant what timber they had lost on account of the alleged breach of the contract by defendant in failing to take *vi et armis* the car of "junk." These matters were not such damages as occurred from the alleged acts of defendant. They were in no sense such as grew out of defendant's failure to accept the carload of "D-stems" and pay for the same. In short, they were not approximate damages, or such as could have been foreseen by defendant, from its mere failure to take a carload of handles from under the plaintiffs' mill shed and pay \$530 for them. Applegate v. Franklin, 109 Mo. App. 293; Grattis v. Railroad, 153 Mo. 380; Fontaine v. Lumber Co., 109 Mo. 55; Saunders v. Brosius, 52 Mo. 50; Insurance Co. v. Boone, 95 U. S. 130; Tucker v. Railroad, 133 Mo. App. 129. (3) The court erred in overruling the objection to the offering of any testimony in this case. The petition did not set out any cause of action. The first count was for certain handles confessedly agreed to be delivered on board cars by plaintiffs, but which the petition avers were never taken, received or accepted by the defendant; but the petition, though counting as upon a complete sale and delivery, does not aver that said handles were ever loaded upon cars or offered to the defendant, as the contract pleaded specifically required and bound them to deliver same, *i. e.*, *f. o. b.* cars. It is elementary law that under this state of facts as set out in the petition by specific allegation and inference, there was no sale, no delivery, the title never passed to defendant and plaintiffs are not entitled to recover as upon a sale. Stresovich v. Kesting, 63 Mo. App. 57. For aught that appears, the prices may have risen on handles, and then instead of defendant's action injuring them, it might have been a blessing to plaintiffs in disguise. They could not by their own action or inaction increase the damages of defendant. Peck & Co. v. Roofing Co., 96 Mo. App. 212; Dietrich v. Railroad, 89 Mo. App. 36; Mahoney v.

Kansas City, 106 Mo. 39; Field on Damages, p. 19. (4) The court erred in overruling defendant's demurrer to the evidence, offered at the close of plaintiffs' testimony, and again offered at the close of all the evidence in the case. *Lewis v. Insurance Co.*, 61 Mo. 534. (5) The court erred in instructing the jury, at the request of plaintiffs, as it did. (a) There was no proof upon which to bottom instruction No. 1, as given for plaintiffs. The mere absence of shipping directions did not, under the contract, furnish any legal excuse for the plaintiffs' default. This instruction improperly states the measure of damages. Had the defendant unlawfully taken the handles and converted them to its use, plaintiffs could have treated such conversion as a sale and recovered full value of the handles on a *quantum meruit*, but we are at a loss to see how the plaintiffs could do this under the facts here. *Lumber Co. v. Warner*, 93 Mo. 388; *Halliday v. Lesh*, 85 Mo. App. 285; *Cobb v. Whitsett*, 51 Mo. App. 146. (b) Instruction No. 2, given by the court for plaintiffs, is not the law under the facts here. The contract says the handles were to be delivered f. o. b. cars at Manila, Arkansas. It is not ambiguous and cannot be construed in the light of the acts of the plaintiffs. *Bader v. Mill & Lumber Co.*, 134 Mo. App. 135; *Brewing Co. v. Water Works*, 34 Mo. App. 49; *Drug Co. v. Saunders*, 70 Mo. App. 221; *Gas Co. v. St. Louis*, 46 Mo. 121. (c) Instruction No. 3 states no legal measure of damages. Defendant, as has already been earnestly insisted, was not liable for hypothetical damages and loss of hypothetical profits arising from the unnecessary idleness of plaintiffs' mill. *Peck & Co. v. Roofing Co.*, *supra*. (d) Instruction No. 4. for plaintiffs, as given by the court, is afflicted with the same vice as instruction No. 3, above discussed, and what is there said applies here. (e) Instruction No. 5, given for plaintiffs, is, appellant submits, vicious for many reasons: It leaves to the jury the duty of construing the contract; it leaves to

the jury the question of law as to the legal effect of the contract, when both of these questions were for the court. *Carroll v. Campbell*, 110 Mo. 557; *Miller v. Dunlap*, 22 Mo. App. 103; *Spalding v. Taylor*, 1 Mo. App. 34; *Albert v. Bessel*, 88 Mo. 150. It leaves to the triers of fact the decision of a wholly equitable question of fraud in the making of the contract. The defense of fraud in making the contract was one solely for the court and not for the jury. The court possibly, upon a proper pleading and a proper case-made, may have found whether or not the contract was fraudulent, or procured by fraud. And so finding, he should have stated to the jury such finding, and not left the matter to them for their finding. *Hancock v. Blackwell*, 139 Mo. 440; *Och v. Railroad*, 130 Mo. 27; *Homuth v. Railroad*, 129 Mo. 629; *Courtney v. Blackwell*, 150 Mo. 245. (6) Instruction four, refused by the court, should have been given. There was present more than an inference that the sole cause of plaintiffs' ceasing operations came from pressure exerted by their many creditors, and this action is a happy afterthought, entered into for speculative purposes by them. At least defendant was entitled to have the matter go to the jury. *Standfield v. Loan Assn.*, 53 Mo. App. 595; *Cahn v. Reid*, 18 Mo. App. 115.

Ward & Collins and *W. S. C. Walker* for respondents.

(1) Respondents had the right to recover the full value of the carload of handles not shipped. *Mugan v. Regan, Super Wells & Co.*, 48 Mo. App. 463; *Lumber Co. v. Warner*, 93 Mo. 374; *Bean v. Miller*, 69 Mo. 384.

(2) Respondents had the right to recover damages for profits they would have made if they had continued manufacturing up to July 1, 1905. *Lumber Co. v. Warner*, 93 Mo. 374; *Mfg. Co. v. Railroad*, 29 Mo. App. 526; *Wiggins F. Co. v. Railroad*, 73 Mo. 389; *Samuel Peltz v. Augustus Eichele*, 62 Mo. 171; *Chapman v. Railroad*, 146 Mo. 481; *Hansard v. Clothing Co.*, 73 Mo. App.

584; *Miller v. Shoe Co.*, 26 Mo. App. 57; 7 Am. and Eng. Ency. of Law (2 Ed.), p. 150. (3) The failure of appellant to accept and pay for the carload of handles which was the basis of recovery under the first count of the petition was sufficient justification for respondents to permit the mill to lie idle or to cease manufacturing. *Lumber Co. v. Warner*, 93 Mo. 389; *Bertold v. St. L. E. Con. Co.*, 165 Mo. 305; *Chapman v. Railroad*, 146 Mo. 494; *Gabriel v. Brick Co.*, 57 Mo. App. 526.

GOODE, J.—Petition in two counts for damages for refusal to perform a contract. Defendant is a corporation now known as the National Handle Company, but formerly as the American Handle Company, under which title, on April 20, 1904, it entered into the following contract with plaintiffs, who were partners:

“Articles of Agreement, made and entered into this 20th day of April, 1904, by and between J. P. Laswell & Co., of Manila, Ark., of the first part, and the American Handle Company, of Cleveland, Ohio, of the second part, represented by ————.

“Witnesseth: That the party of the first part agrees to sell their entire output of handles made at their mill from date until July 1, 1905.

“Handles to be as near as possible to the requirements of the second party, and such as are named in their schedule, which is hereby attached and forms a part of this agreement.

“The second party agrees to buy said first party’s handles for the time as stated above and will pay:

“15 per cent advance for XX; 10 per cent advance for X and No. 1’s, f. o. b. cars at Manila, 15c per 100 pounds freight allowed. Inspection to be made at first party’s mill. Terms cash.

“J. P. Laswell & Co.,

“By J. P. Laswell.

“American Handle Co.,

“G. B. Durell, Treas.”

Said contract had attached as part of it a schedule of the varieties and sizes of handles to be taken by the American Handle Company under it. The contract was executed in duplicate and the schedule attached to the copy retained by defendant showed at the trial the species of handles known as "D-stem" had been entirely erased, whereas the schedule attached to the copy retained by plaintiffs showed defendant was to accept from plaintiffs D-stem handles of certain kinds, but the printed provision for D-stem handles of other kinds had been struck out. Plaintiffs, who lived at Campbell, Missouri, moved to and established a mill at Manila, Arkansas, at a cost of five thousand dollars, to manufacture handles and supply them to defendant pursuant to said contract, entered into an agreement with the owners of eight sections of land covered with ash timber suitable for handles, to buy the timber, and in other ways prepared to perform their contract. The arrangement between the parties required the handles manufactured by plaintiffs to be inspected by an inspector furnished by defendant, before defendant was bound to accept the output of plaintiffs' factory, and the course of action followed in performing the contract was for defendant to inform plaintiffs where to ship the handles after they had been manufactured; whereupon it became plaintiffs' duty to get suitable cars from the railway company, load the handles at their expense and forward them according to defendant's directions. Defendant knew plaintiffs could not procure cars until they were able to notify the railway company what destination they were desired for, and this they could not tell until defendant advised them. Defendant company dealt in handles, its main place of business being at Fort Wayne, Indiana, though its correspondence was written from Cleveland, Ohio. From August to October, 1904, plaintiffs manufactured, sold and delivered to defendant seven carloads of handles of varieties mentioned in the schedule, but another car-

load, which was composed of 37,000 handles, of which 22,000 were D-stems, was not taken by defendant. These D-stem handles are a kind used for spades, shovels and garden forks, and are so called because the part of the handle grasped by the hand of the person who is using an implement to which such handle is attached, is in the shape of a "D," the straight part being held in the hand, while a stem of varying length, twenty-four to thirty-two inches, extends from the rounded part of the D to the iron socket in which the handle is fastened. Plaintiffs manufactured only the straight part or stem of the handle, the D part being attached by defendant. As these handles were short, they were made of pieces of timber left after longer varieties had been made. This carload of 37,000 handles seems to have been ready for delivery as early as August, 1904, but though defendant was notified of the fact and had the handles inspected, it did not notify plaintiffs where they were to be shipped, and instead a correspondence ensued which shows procrastination and evasion by defendant, and the handles have not yet been accepted or paid for. It will be observed defendant's letters said nothing of these handles being different from the varieties called for in the contract, as it claimed later by way of excuse for not taking them. The correspondence, which is important, as it shows the spirit of the parties about carrying out the contract and also that defendant knew plaintiffs needed prompt payment for their output in order to run their plant, will be abridged. The first letter relevant to any point involved in the appeal was written by plaintiffs June 14, 1904, and asked defendant to send an inspector at once to take up two carloads of handles and for advice where to ship. The letter said:

"If you will let us know what kind of cars you will want to ship in, we will order them in so as not to delay the shipment; our reason for wanting to get these two

carloads out soon is, that we have been much longer getting them made than we expected, and our plant cost us more than we figured, and we are short of money to pay for timber."

On June 17, 1904, defendant, by its manager, George B. Durell, answered saying an inspector would be sent as soon as possible; that the only man available for the purpose was at South Campbell, Missouri, and he would be written to go to Manila as soon as possible. On June 20th plaintiffs wrote defendant of information they had received which looked like the arrival of the inspector would be delayed and saying: "If we would have to wait for the inspector until he finishes at Campbell, we will be compelled to shut down for the want of room and funds. If you could have the inspector leave the Campbell handles and take up our two loads, or make us an advancement of about fifty per cent, say eight hundred dollars, on the two cars, this will enable us to build more room and go ahead with the work. . . . Do the best for us you can; we do not want to shut down if possible to prevent it. We are getting some fine timber now. We note what you say in regard to getting all the 6-ft. hay fork handles we can, and will be governed accordingly." On July 2, 1904, plaintiffs again wrote defendant saying no answer had been received to plaintiffs' letter of June 20th; that they had ready for shipment three carloads of handles and defendant would greatly oblige by sending a check for \$500 as an advance on these cars, as nothing had been heard from the inspector. Durell answered on July 11, 1904, saying defendant's inspector at Campbell had been ordered to stop work there and go to Manila, Arkansas, to take up what handles plaintiffs had on hand; that defendant could not allow plaintiffs to draw in advance of handles being taken up. On August 5, 1904, plaintiffs wrote they had 15,600 hay fork handles loaded in a car and ready to ship; also 20,000 handles of different lengths which

had been inspected; that they could furnish a car by the first of next week, and would like the inspector to load them out before he left Manila, as this would put plaintiffs "in good shape until the next inspection;" that plaintiffs had not received check for the last carload and defendant would please send it at once. On August 11, 1904, plaintiffs wrote: "We are very much inconvenienced by not receiving check for car 11277 shipped July 25th, and cannot understand why we have not received remittance before now. We would be pleased to hear from you regarding this car; also car 14382, shipped Aug. 8th. We have got a carload handles here inspected and tied up; also have one carload of 5-ft., 5½ & 6-ft Hays made. We are getting in logs for winter run and need money very badly." On August 13th, 1904, defendant telegraphed plaintiffs it had sent check for \$750 on August 11th, and asked plaintiffs to send a list of handles which had been "inspected and tied up." In answer to the telegram plaintiffs wrote on August 13, 1904, they had not received the check and were very sorry it did not arrive by pay day; that they were getting in timber beyond their daily capacity, needed the money to keep them going and asked remittance on receipt of the letter of all that was due; also whether defendant would pay for 26,000 handles tied up at Manila which had been inspected, or whether plaintiffs would have to wait until they were shipped. On August 15, 1904, plaintiffs wrote defendant giving a list of handles on hand which had been "inspected and tied up;" saying they had, too, a carload which had not been inspected, consisting of hay fork handles, about 9000 D-stems and some other varieties. The letter said it would be a special accommodation if defendant would advance \$500 on the handles that had been "inspected and tied up," and send an inspector so all the handles plaintiffs had made could be shipped. On August 27, 1904, plaintiffs wrote, allowing a deduction for an alleged small short-

age in a certain car of handles, and inclosing a bill for \$949.20, less fifteen per cent for freight charges, which was due them for handles already shipped. The letter said plaintiffs had been very much inconvenienced by defendant's holding the remittance back; also, "you are well aware of our financial condition; we will again ask you to mail us a remittance at once; also wire us on receipt of this that you have done so. You have here tied up and inspected by Mr. Woolworth, 26,875 handles, amounting to \$715.45; we would like for you to make us an advancement on these handles of five hundred dollars. We also want you to send an inspector at once to take up three carloads of handles. . . . We have had no answer to our last letters written you in regard to a remittance." On September 30, 1904, plaintiffs wrote, sending a list of handles on hand which had been "inspected and tied up" and a list of others ready for inspection. This letter said: "We hope to get shipping instructions for the above handles at once; *we need the money to pay for timber already contracted for our winter's run and we have to pay for this timber before cutting it.* The timber is good and the bores are fine now and we hope to be able, by getting pay promptly for the handles we have made now, to lay in our winter's supply of logs; but we will be unable to do very much until we get the returns for the above handles. . . . *Mr. Woolworth is working on D-stems today; will probably finish them tomorrow.*" No further letters appear in the record from October 17, 1904, until December 27th, following, when defendant wrote plaintiffs, acknowledging receipt of a letter written by the latter on December 23, 1904, and saying defendant had searched through papers but could not find a memorandum of handles which plaintiffs referred to; for plaintiffs to forward a memorandum at once and on receipt of it defendant would "give a definite answer." This letter will be intelligible if it is remembered plaintiffs testified they had informed defendant early in

October, 1904, they had on hand and inspected and ready for shipment, the carload of 37,000 handles, mostly D-stems, but could get no advice from defendant where to ship or an answer to their letters on the subject. Defendant's letter of December 27, 1904, refers to that matter and evidently was written in response to one received from plaintiffs. On January 20, 1905, plaintiffs again wrote saying they were anxiously awaiting a reply in regard to shipping handles; that they wanted to make handles for defendant through the year 1905, as they had arrangements for timber, and if they could get the capital they had written to defendant about, would be able to do considerable business. No reply was received to that letter, but on April 10, 1905, Laswell met Durell by appointment at Blythesville, Indiana, and a conference occurred between the two. After October 27, 1904, as defendant contends, or December 27th, as plaintiffs contend, the latter had ceased to operate the mill and had taken their families back to Campbell, Missouri, for the sake of health, but with the intention on the part of plaintiffs, they testified, to resume operation of the plant when they could get pay for the handles already on hand and felt assured their output would be taken by defendant. The amount due for the inspected handles was about six hundred dollars and plaintiffs said they could not operate their factory until this money was paid, because they could not pay for timber; that not receiving payment for said handles forced them to relinquish contracts for timber and other material, and, moreover, they could not do business if uncertain about defendant taking their product according to the contract; that they had very little capital to begin business on, had gone in debt for machinery and had consumed the profits up to October, 1904, in paying same; that without the money for the handles ready for delivery, they were wholly unable to continue business, and so defendant had been advised. The conference

at Blythesville between Laswell and Durell was with reference to the handles plaintiffs had manufactured, but defendant had not accepted, so Laswell said; whereas the testimony of Durell goes to show the purpose of defendant was to induce plaintiffs to resume the operation of their mill under a new contract. Laswell testified Durell had once said he would take the handles in question, had made arrangements for a lot in Memphis and as soon as a building was erected would take them; then said there was a building on the lot already, and if he could rent it, would take them as soon as the St. Louis & San Francisco Railroad Company built a track to it. Laswell testified further:

"I said to Mr. Durell, 'If you rent this house, why can't we ship the handles and have them carted over; not wait for the railroad to build these tracks, because I have had some experience with railroads putting in sidings, and it is very slow sometimes,' and I said, 'can't we have them drayed over to this house instead of waiting for the tracks to be put in;' he said, 'certainly, we can do that if I can rent the building,' and he said, 'we will take these handles not later than sixty days anyhow; we can have everything arranged, and if I can rent the house, I will take them sooner;' so that suited me exactly.

"Q. What did he say about paying for them?
A. Well, it was understood he was to pay for them when they were loaded on the cars. That was their contract and not until, and we couldn't load them until we found out where to load them to; that is where they had us.

"Q. Is that all of the conversation you had with him at that time? A. I think we talked something about making handles for him again; I am not sure; it seems like we did."

Laswell said plaintiffs waited two or three weeks after that agreement, to hear from defendant, and then wrote a letter or two asking why the handles had not

been taken as agreed at the conference. No reply was received until September 29, 1905. Durell testified Laswell met him at Blythesville by appointment in regard to plaintiffs' contention defendant was to take the car-load of handles; said defendant called the D-stems "junk" and there was very little sale or use for them; that Laswell wanted to know what defendant would do for him in regard to them and they talked the matter over a good deal, a good many propositions being made back and forth; finally they agreed defendant would take the lot as soon as it could get a warehouse to store it in; that Durell told Laswell defendant had handles piled out of doors, and the same condition prevailed in other places; there was a good demand for them, but defendant was short of warehouse room and just as soon as it could get a warehouse it would take the handles. Further:

"At the time I entered into the agreement with him that he would start up his mill, he said—he admitted his trouble had been that he hadn't had sufficient capital to run it, but he had hope of getting other capital and if we would give him a contract he would be able to start up his mill and make handles for us again; and I told him if he would do that, that we would write up a contract a little differently in which the sizes and specifications would be more clearly expressed than in the first one; the first contract was perfectly clear to a man that understands the handle business; Mr. Laswell hadn't had any experience in the handle business and therefore he got into trouble; so in the second one I drew up I drew it up so there would be no trouble on that score.

"Q. You drew up the contract which has been offered in evidence here by the plaintiffs and the one which I now show you dated the 28th of October, 1905?
A. Yes, sir; I dictated that."

Durell excused defendant for not taking the car-load of handles, mostly D-stems, after the conference

on the ground that the Frisco Railroad Company had refused to build a side track to defendant's storage room in Memphis; said further regarding defendant's conduct, that it did the very best it could; its business was a peculiar one; it had dealings with more than a hundred manufacturers over the country and but few inspectors, whom it distributed to the factories as promptly as possible. He said in regard to the contract of October 28, 1905, that he wanted to make it so clear there would be no question about it and put in everything he could think of regarding the length of handles wanted. Laswell testified further as follows regarding the second contract:

"Q. Now you have already referred to and identified a second contract that you made with the defendant company here about October 28, 1905, signed and mailed to them about November 5, 1905; you may tell the jury if at the time you entered into that contract the condition as expressed by you and understood by you was that he should pay you this \$616 as a condition precedent to making the contract? A. Well, I can tell the jury how we came to make the second contract; after I met Mr. Durell at Blythesville, and he promised to take the handles and didn't do it, and then we wrote him to know why he didn't do it, and then he wrote back to us and sent us this contract and wrote in the letter that if we would send the contract. . . . If we would sign the contract for another year, he would give us shipping instructions for these handles.

"Court: The question is how you came to make the second contract? A. We had our plant down there standing still; was ready to run; all we needed was this six hundred dollars to start with and we thought we could make some money; and we could I think, but we didn't have the money to start with. . . . We wanted to run a plant and he sent us a contract and he sent us shipping instructions for the handles (N. B. Evi-

dently means Durell wrote he would send instructions) and we sent the contract; we knew if we got the money we could run and that was the last; we never got to ship the handles; we wanted to run; we wanted to make handles; were anxious to.

"Q. Then was it or not that you expected to get pay for these handles from him that you signed this contract? A. Why certainly, my letter there shows that, that we sent back with the contract.

"Q. Now, Mr. Laswell, after signing this second contract did he ever pay you this money you had been worried about and you had been thinking about? A. He never did pay us a cent of money."

Taking up now the correspondence between the parties after April 10, 1905, the first letter we find was dated July 11, 1905, and said plaintiffs had everything ready to start up and then was the best time to get timber; that they would appreciate it very much if defendant would take the handles on hand and give orders for more cars, so plaintiffs could start; that if defendant would take the handles on hand and pay for them, plaintiffs would then have sufficient means to run until they could get out two or three cars; for defendant to answer at once as plaintiffs wanted to be doing something; that Durell had promised he would take the handles which had been inspected, "*just as soon as he could find room to store them.*" The first letter from defendant was written September 29, 1905, and reads thus: "It has taken much longer than we anticipated to get facilities for storing handles in Memphis. We have now the building ready for use, but the side track is not yet fully completed. We hope, however, to have same completed in a few weeks. When I last saw you, you stated that you would like to make handles again for us this fall. Please advise us how this will be." On October 28, 1905, Durell inclosed duplicates of the contract of that date with the following letter: "I did not get home as early as I anticipated.

I herewith enclose a contract in duplicate. If this is satisfactory to you, please sign both copies, retaining one for your files, and returning the other to us. *Upon receipt of same we will give you shipping instructions for the handles about which we have been corresponding*, though a considerable part of this is dead stock for which we have no use." The contract inclosed was this one:

"Articles of Agreement, made and entered into this 28th day of October, 1905, by and between J. P. Laswell & Co. of Manila, Arkansas, party of the first part, and the National Handle Company of Cleveland, Ohio, party of the second part.

"Witnesseth: that the party of the first part agrees to start up and operate its handle factory at Manila, Arkansas, for the purpose of manufacturing long ash handles for the party of the second part, and to continue the same in operation to July 1, 1906, weather conditions permitting.

"All handles to be manufactured as nearly as possible according to the specifications to be furnished by the second party, and to be of the following sizes and grades: 6', 5½', 5' and 4½' hay fork, in three grades; 4½' manure, 6½' standard pattern rake, 5½' and 5' black land hoe in three grades, and 4', 3¾' and 3½' hay in XX grade and 4' manure fork in XX and X grade; and to be manufactured in accordance with the schedule of sizes in the standard handles schedule No. 3 of the second party, which is hereto attached and made a part of this agreement.

"Party of the first part agrees to sell the handles so manufactured to the party of the second part, and the party of the second part agrees to buy all of the same at the list price plus 10% as they appear upon said standard handles schedule No. 3, f. o. b. cars, Manila, Arkansas, full freight allowed on shipments to Memphis, Tennessee, and on shipments to other points,

a freight allowance to be made equal to the freight from Manila, Arkansas, to Memphis, Tennessee.

"It is estimated that all the handles that will be manufactured by the first party during the period of this contract will be from 600,000 to 1,000,000.

"Said handles are bought and sold upon the grading and inspection of the second party, at the plant of the party of the first part, in Manila, Arkansas.

"Terms cash. NATIONAL HANDLE CO.,

"J. P. LASWELL & Co., By C. B. DURELL, Treas.

"By J. P. LASWELL."

Plaintiffs signed both copies of said contract, retained one and returned the other to defendant with the following letter of November 5, 1905: "In answer to your letter of the 28th ult. we inclose contract signed. *Please give us shipping directions for the handles now on hand, as we cannot start up until we get pay for them.* Trusting you will give this matter your immediate attention, as we are anxious to get started." After the execution of the contract defendant furnished no specifications for handles, made no request for them and did nothing else toward performing or demanding performance, except writing certain letters to be shown infra. On November 14, 1905, defendant wrote acknowledging receipt of the contract of October 28, 1905, duly signed by plaintiffs, and asking plaintiffs to procure and send defendant the best freight rate to Fort Wayne, Indiana, on handles plaintiffs had on hand. On November 20, 1905, plaintiffs wrote to defendant, advising it the rate from Memphis to Blythesville, was four cents per hundredweight, and saying defendant had the rate from Blythesville to Fort Wayne. Blythesville was but a short distance from Fort Wayne. Durell testified that on November 24, 1905, he wrote plaintiffs to ship the handles they had on hand to Fort Wayne, but plaintiffs testified positively they never received any such letter and circumstances corroborate

them. On January 3, 1906, plaintiffs wrote defendant the following letter:

"As we have not had any reply to any of our letters for the last month, we presume you do not intend to comply with your agreement with us, and if so will you kindly write us to that effect and return our contract for handles to be made by us for you this year. We have some prospect now of selling our plant, in fact, we have two prospective sales. We had much rather keep and operate the plant ourselves; but as we have often written you, that unless you pay us for the handles which you have taken up from us at Manila, we are unable to start and run the plant."

The letter stated Durell's promise to take and pay for the handles and said:

"If you have decided not to pay us for these handles, please write us to that effect and we will make claim for them with all the loss we have sustained on your account. If you will send us an advance of five hundred (\$500) dollars, we will start up at once and carry out our new contract. Please answer and oblige."

No reply was received to that letter and it ended the correspondence between the parties; but some letters passed between a firm of attorneys representing plaintiffs, and defendant, and on March 13, 1905, Durell, for defendant, wrote said attorneys a long letter, the substance of which was that defendant had entered into the contract of April 20, 1904, with plaintiffs, on their promise to manufacture five thousand handles a day; that the paper was really a memorandum of a contract to be carried out in a fair-minded spirit by both parties, as it did not bind plaintiffs to make a certain quantity per day or defendant to take the handles at any special times; that plaintiffs had insisted on defendant accepting every "little jag of handles" plaintiffs would get out and have an inspector there to take them up, which caused too much expense, and it

was the custom of defendant to send an inspector only when there were several cars of handles ready; that the contract required plaintiffs to make handles as near as possible to the requirements of defendant, which meant plaintiffs were to write and ask what kinds were to be manufactured before making them and this had not been done; that the inspector did not know what the contract was as it was not safe to let him have the information and defendant's inspectors merely passed the handles and then defendant wrote them what should be done with the installments inspected; that if plaintiffs had manufactured at the rate of three thousand a day and had had several carloads accumulated before asking for an inspector, there would have been no trouble in getting defendant to take all the handles turned out, though some of them were not in the schedule attached to the memorandum of contract; that defendant would accept the handles on hand less twenty-five per cent discount from the price named in the contract if plaintiff would enter into an agreement that this was in full settlement and cancellation of the contract of April 20, 1904, and the reason for this proposition was defendant did not want plaintiffs to go ahead and make "little jags of handles" and demand an inspector for them. The attorneys wrote back under date of April 1, 1905, controverting the various statements in Durell's letter, saying the handles on hand had been inspected and the inspector in each instance compared the installment delivered with the contract, and wound up by saying if defendant would pay for the handles on hand, plaintiffs would waive the question of damages and cancel the contract; if not, would sue and recover all they could. No reply to this letter is in the record, but the conference of April 10, 1905, followed it.

Plaintiffs ask damages to the amount of \$616 on the first count of their petition, for the direct loss suffered by them in consequence of defendant's refusal to pay for the carload of 37,000 handles. In the second count

they ask for compensation for loss of profits which would have been earned if the contract had been carried out in full, and plaintiffs had manufactured and defendant had accepted and paid for the whole number of handles called for in the original contract of April 20, 1904, ascribing this loss to the same breach declared on in the first count, namely, defendant's refusal to accept and pay for the last carload of handles, which action of defendant, forced plaintiffs, it is alleged, to close their factory and suspend business, surrender contracts for the purchase of a large quantity of valuable handle timber they had contracted for at a fair price and from which they would have made a profit; alleges if said contract had been carried out, they would have earned thirty dollars net profit per day from the manufacturing of three thousand handles, the daily output of their factory, and in performing the whole contract would have earned a total of \$4500, for which sum they prayed judgment. The answer admitted the execution of the contract declared on in the petition, denied the other averments and alleged further defendant complied in all respects with its part of said contract, took and paid for all handles manufactured and delivered free on board cars by plaintiffs of the kinds and grades mentioned in the schedule attached to the contract. In answer to the second count of the petition, defendant denied its averments and set up a counterclaim for breach by plaintiffs of the contract of October 28, 1905, copied *supra*. Plaintiffs replied to the counterclaim with averments to be stated *infra*. The jury found for plaintiffs on both counts of the petition, assessing their damages at \$555.34 on the first, and on the second count at \$2500; they also found the issues for plaintiffs on the counterclaim.

I. The first count of the petition asked judgment for \$616.30, the value of the 37,000 handles defendant failed and refused to take. Though defendant insisted

before this action was brought those handles were, in the main, of a kind the contract did not require it to take, and renewed this contention in its answer, it was conceded on the argument of the appeal the D-stem handles were embraced in the schedule attached to the first contract, hence were as much a part of said contract as any other variety and defendant was as much bound to take them. The defense insisted on to the first count is that defendant was not bound to take the handles unless they were loaded on cars, because the contract required plaintiffs to load them free on board cars, or at plaintiffs' expense, which never was done, or even alleged in the petition to have been done; wherefore it followed plaintiffs neither stated nor established a cause of action as regards the subject-matter of the first count. What had already been done under the contract and the correspondence between the parties and the testimony for both sides show it was understood the proper method to follow was for plaintiffs not to load until they were advised where to ship. Under date of October 28, 1905, Durell wrote plaintiffs if they would sign the contracts inclosed, shipping directions regarding the handles they had on hand would be sent, and, indeed, he testified to writing, stamping and mailing, on November 24, 1905, a direction to ship those handles to Fort Wayne. In view of the course of business and the understanding between the parties with reference to this matter, we hold if defendant omitted to instruct plaintiffs where to ship, it was not expected plaintiffs would load the handles, and omitting to load does not defeat recovery by plaintiffs. On the contrary, if defendant sent advice where to ship, as Durell testified, and plaintiffs received the letter, which they denied, then they failed to perform. If the letter was sent but not received and plaintiffs a little more than a month afterwards, on January 6, 1906, again wrote for advice, and defendant received the letter it is in default and not plaintiffs. The posi-

tions taken by the parties on this defense were placed before the jury in sound instructions and the right of the matter was settled by the verdict. The court instructed that if the handles mentioned in the first count were in accordance with the schedule attached to the contract, had been inspected and plaintiffs could not load them on cars until a shipping direction was given by defendant, and it never gave this direction nor accepted the handles, the issues on the first count should be found for plaintiffs. Further, that though the contract required plaintiffs to deliver the handles f. o. b. cars at Manila, Arkansas, if the jury believed from the evidence plaintiffs could not load them until defendant gave a shipping direction, or by the established course of business under the contract, the handles were not to be loaded on cars except on receipt of advice where to ship, and this advice never was furnished, then plaintiffs were not required to load in order to recover on the first count of the petition. For defendant the court said if the jury found plaintiffs were advised where to ship, but the handles were not shipped to nor received by defendant, plaintiffs could not recover for them; further, that the contract of April 20, 1904, bound defendant to take only such handles, of the kinds and grades set forth in the schedule attached to the contract as might be made by plaintiffs at their mill and loaded on cars at Manila, and if defendant accepted and paid, or offered to pay for all handles of said kinds and grades, or gave shipping advice for and offered to take all such handles, the finding on the first count should be for defendant. In *Kingsland, etc., Co. v. Iron Co.*, 29 Mo. App. 526, the case was to recover the price of certain castings manufactured and delivered to defendant, but not paid for, and other castings the plaintiff had offered and been ready and willing to deliver to the defendant, but it had refused to receive. As to the latter castings, the defendant contended the plaintiff had made no offer to deliver them, but it ap-

peared advice had been requested from the defendant what to do with them and the latter had refused to give any. The court said as the contract between the parties did not specify where or when the castings should be delivered, it was the plaintiff's duty to notify the defendant it was ready to deliver and ask that a place of delivery be designated. The defense is specious that the defendant at bar would have taken and paid for these handles had they been loaded on cars, for it never took this position in correspondence or conference about the matter, but evaded taking any position and later declared it was not bound to accept the handles because they were of a kind not mentioned in the schedule attached to the contract. In this view of the matter the case just cited is also in point; for touching the like contention, the opinion said, in effect, a tender was unnecessary where the person to whom it should have been made had showed he would refuse it if made (l. c. 538). The verdict on the first count was rendered under sound instructions and may stand.

II. In the second count of the petition plaintiffs prayed damages for the profit they would have made if the contract of April 20, 1904, had been carried out in full to the date of expiration, July 1, 1905, alleging defendant refused to perform its obligation subsequent to December 27, 1904, or to accept and pay for handles afterwards manufactured, though often requested to do so, and thereby forced a suspension of the business and the closing of the factory. The substance of the breach alleged in the count is the refusal of defendant to direct where to ship or accept and pay for 37,000 handles of the value of \$616.30, which plaintiff had ready for delivery in October, 1904. This default is charged to have forced plaintiffs to suspend business, it being alleged that otherwise and if the contract had been carried out by defendant, they would have manufactured 3000 handles a day at a net profit of ten dollars

a thousand, and their total profits from December 27, 1904 to the expiration of the contract on July 1, 1905, would have been \$4500. For plaintiffs the court instructed, in substance, that if the jury believed they complied with the contract, but defendant failed to accept and pay for the handles manufactured and thereby plaintiffs were forced to stop manufacturing and let their factory remain idle from December 27, 1904, to July 1, 1905, and were damaged, the verdict should be for them on the second count in a sum not to exceed \$4500; that the measure of damages on said count was the net profit plaintiffs would have made under the contract between the dates mentioned. As defendant contended plaintiffs closed their factory in October, 1904, because of lack of means wherewith to operate it, and not on account of defendant's default, the court instructed at the latter's instance, that neither of the contracts in evidence required defendant to pay plaintiffs money in advance on handles to be manufactured thereafter, and though defendant refused to make advance payments, this was no breach of the contract or ground for awarding damages to plaintiffs; that unless the jury found defendant committed "a breach of the contract sufficient to be the proximate cause of stopping plaintiffs' mill in October, 1904," the verdict and finding should be for defendant on the second count of the petition. An instruction was refused of this tenor: If the jury believed plaintiffs shut down their mill in October, 1904, because they were in debt to various firms and unable to pay their creditors, the verdict and finding should be for defendant on the second count.

These contentions are put forward by defendant against the verdict on the second count: First, the evidence shows beyond inference to the contrary plaintiffs ceased to make and tender handles, in other words to perform their undertaking, because of lack of capital and not from any breach of contract by defendant; second, defendant did not breach the contract at all, or,

at least, to an extent that would permit plaintiffs to cease tendering handles and recover profits on the whole contract; third, the court erred in its rulings on the requests for instructions relating to the second cause of action. No doubt both Laswell and Post, the two plaintiffs, gave testimony from which the jury might have concluded they abandoned work solely in consequence of their funds being exhausted; further that they would have been able to continue had defendant promptly paid for the carload of handles containing D-stems; that they were unable to do so without such payment, and hence not receiving it forced them "to stop manufacturing handles and . . . to let their factory remain idle from the 27th day of December, 1904, until the expiration of the contract . . . on July 1, 1905," as an instruction for plaintiffs reads. But the evidence was not so uniform in favor of those conclusions as to exclude any other. From the testimony of the plaintiffs might be drawn these inferences: Though in debt, they could and would have borrowed money for operating expenses and the purchase of timber, could have procured indulgence from their employees in the payment of wages and thus have continued to operate the factory and furnish handles to defendant; but the latter's behavior induced plaintiffs to believe it would take no more deliveries, especially no D-stems; wherefore plaintiffs were deterred from manufacturing, and finally, after futile efforts down to December 27th to get defendant to accept the D-stems, were caused to cease offering to manufacture. The testimony of plaintiffs as a whole is, they would have been helped by and expected payment for the untaken carload and were embarrassed by not receiving it; but their reason for ceasing work October 20th, was defendant would give no shipping direction for the carload after it had passed inspection with four other carloads, the latter being accepted and paid for at once. Plaintiffs endeavored from the latter part of

September or the first of October, when the inspection occurred, and the other cars were accepted, until December 27th, to obtain a shipping direction for this car; and though they were so far daunted by defendant's conduct as to cease turning out handles on October 20th, they seem not to have lost hope or to have stopped offering to go on with the contract, until the former date. Therefore we reject the argument that no inference could be drawn regarding cessation of performance by plaintiffs except that it was in consequence of want of capital and of defendant's failure to pay for the car containing D-stem handles. We hold it could be found the cessation was due to the refusal of said handles and the well-founded belief of plaintiffs that no D-stems would be accepted, rather than to inability to operate for lack of means or of the price of the rejected carload. We hold further, the jury might find from defendant's conduct it had refused to accept and pay for said carload. The contract did not say when handles turned out by plaintiffs should be inspected, and, if found up to requirements, paid for; and in the absence of a stipulation regulating this matter, both parties were bound to rest content with reasonable conduct. The course of business followed through several months showed both understood defendant should have the output of the factory inspected at intervals, and promptly thereafter give shipping directions and pay for such handles as passed inspection. Taking the four cars inspected along with the D-stems and not taking them at the same time or for some two or three months afterwards, were facts conducing to show they were refused. If so refused, defendant breached the contract; for it is conceded D-stems were mentioned in the schedule as a kind defendant agreed to take. This brings us to the question, and it has been difficult to answer, whether the breach was of a character to permit plaintiffs to cease performance of the contract and recover the profits they would have earned

had it been carried out; or whether, if they would recover such profits, it was essential for them to offer further performance. We have been embarrassed by the uncertainty of the record about how long the rejected handles had been on hand and ready for inspection and when they were inspected. The correspondence reads like plaintiffs complained through August and September of needing an inspector for them, and looks, too, like they must have been passed prior to September 30, 1904; for then plaintiffs wrote defendant they had been inspected and "tied up." It is certain they were passed some time in September and later, about the last of said month, four other carloads were taken and they were not. It is certain also plaintiffs urgently but vainly requested a shipping direction for them through three months. The evidence goes to prove defendant's behavior was artful, disingenuous and pursuant to a purpose to evade taking any D-stem handles and possibly any handles plaintiff might manufacture. It delayed answers to plaintiffs' appeals; gave inconsistent reasons for its conduct, asserted sometimes the rejected handles were of a kind not covered by the contract, at others that plaintiffs wanted too many inspections; that there was no demand for D-stem handles in the market, defendant's storage room was overrun, that it had written a shipping direction which likely never was written, and, finally, when threatened with an action for damages by plaintiffs' attorney in March, 1905, defendant had its manager Durell meet Laswell at Blythesville, Indiana, agreed there to take the rejected handles inside of sixty days, evaded this agreement on the pretext of lack of storage room and shipping facilities, more than six months later sent plaintiffs duplicate contracts to be executed which Durell said were agreed upon at the April conference, promised if they were executed to accept the handles on hand, failed thereafter to accept them and never called for any handles under the new contract. The

inference may be drawn from such behavior that defendant desired to escape taking more of plaintiffs' output, either because the demand for handles was dull, or because no storage room was available, or, as Durell wrote plaintiffs' attorneys, because it was too expensive and troublesome to comply with plaintiffs' requests. In the letter written to the attorneys, and admitted in evidence without objection, defendant asked the cancellation of the first contract. We will presume defendant intended to accept from plaintiffs all the handles their mill would turn out, other than D-stems, but it is reasonably plain the latter kind were not desired and would be refused if tendered. Durell finally took the position those handles were not mentioned in the schedule attached to the contract and defendant was under no obligation to take them. As said *supra*, it was conceded on the appeal they were one of the varieties called for in the schedule. Moreover, they were manufactured from parts of timber left after long handles had been made, and in order for plaintiffs to work up their timber advantageously and realize in full measure the profits of their contract, they were bound to manufacture D-stem handles.

Plaintiffs cannot recover unearned profits unless defendant's conduct sufficed, in contemplation of law, to prevent them from further performance; if it did, they can. [Pond v. Wyman, 15 Mo. 175; McCullough v. Baker, 47 Mo. 201; Murphy v. Block, 78 Mo. App. 316; Chapman v. Railroad, 48 S. W. 646.] A party may be prevented in several ways from keeping a contractual obligation and yet remain entitled to the full benefit he would have derived from keeping it; as if the other party renders it impossible for him to keep it. [Jarrett v. Farris, 6 Mo. 159; Seaman v. Paddock, 55 Mo. App. 96.] Or directs him to desist from performance, as happened in the cases cited for plaintiffs. [Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; Chapman v. Railroad, 146 Mo. *supra*; Ber-

thold v. Const. Co., 165 Mo. 305, 65 S. W. 784.] Or fails to keep a condition precedent. [Monks v. Miller, 13 Mo. App. 363; Craycroft v. Walker, 26 Mo. App. 469; Filley v. Pope, 115 U. S. 213.] Or expressly renounces the contract. [Claes, etc., Co. v. McCord, 65 Mo. App. 507.] Or abandons it. [Henry v. Bassett, 75 Mo. 89.] Or breaches covenants of such importance the breach is equivalent to renunciation. [Freeth v. Burr, 9 C. B. 208; Graver v. Scott, 80 Pa. St. 88; Koerper v. Inv. Co., 102 Mo. App. 543.] The last mode of preventing performance is the only one that possibly may be applicable to this controversy; and we premise the discussion of whether it is applicable, by remarking we are dealing with a case wherein the question is not what breach of an agreement by one party will discharge the other, or entitle him to rescind, or recover for what he has already done, but what breach suffices to entitle the innocent party to cease performance and, after the contract has expired, recover unearned profits. The old cases and perhaps some modern ones, appear to say no breach will do this unless it deprives the innocent party of the total consideration for which he entered into the agreement; that for less harmful results redress must be sought in damages on the broken covenant, and the aggrieved party may not rescind, or if he may, he will not be allowed to recover except for what he has done. On the contrary, eminent courts have held it is enough if the contract is broken in a way to show the culprit repudiates a substantial part of his obligation, and the repudiation will leave the objects and consideration which induced the other party to make the agreement, unattainable. [Boone v. Eyre, 1 H. Bl. 273; Phillips v. Bruce, Anthon. N. P. 89; Keenan v. Brown, 21 Vt. 86.] Perhaps the prevalent rule is that mere failure to pay money when due will not warrant him to whom it is due to no longer keep his engagement and permit a recovery as though he had. [Palm v. Railroad, 18 Ill. 223.] Stipulations

in commercial transactions are most apt to be treated as dependent and indivisible, on the theory that this course conforms to the intention of business men, who are accustomed to depend on prompt compliance with engagements and may be ruined by tolerating breaches. That reason is pertinent to the case in hand, since plaintiffs went in debt for their mill, machinery and timber solely on the faith of their engagement with defendant, and expecting to meet their liabilities with the money to be collected on installments of handles. However they failed to insist on a proviso that carloads should be inspected and taken at stated intervals or to make those acts conditions precedent to further deliveries. Therefore we hold the failure to take and accept promptly a single carload, did not, of itself, excuse plaintiffs from going ahead and yet enable them to recover future profits. In *Norrington v. Wright*, 115 U. S. 188, the plaintiffs in London had agreed to sell the defendants in Philadelphia five thousand tons of iron rails to be shipped "at the rate of about one thousand tons per month." During the three months following, the shipments were four hundred tons in February, 885 tons in March and 1571 tons in April. As soon as the defendants learned of these deviations from the contract, they gave notice of rescission, but the plaintiffs continued to tender deliveries and afterwards sued for the total price. The defendants were held justified in rescinding because of the departure from the stipulated terms, it being ruled the expression "about 1000 tons a month," was of the essence of the agreement and the word "about" did not warrant deviations to the extent they occurred. The court examined numerous English and American cases and pointed out their accords and conflicts. In *Hoar v. Rennie*, 5 H. & N. 19, the like judgment was given; but in *Simpson v. Crippins*, L. R. A. 2 B. 14, on such a contract deviations in delivery were held not to justify rescission; and so it was ruled in

Brandt v. Lawrence, 1 Q. B. D. 344. In *Borres v. Shand*, 1 Q. B. D. 70, 2 Q. B. D. 112, 2 App. Cas. 455, it was ruled in conformity to *Hoar v. Rennie*, a contract to ship three hundred tons of rice at Madras during March and April was breached in a way to justify rescission by shipping in February, though it was shown rice shipped in the latter month would be as good as though shipped in the former. It was said that in these mercantile contracts stipulations were inserted presumably because they appeared important to the parties and the courts were not at liberty to reject them as unimportant. In *Henck v. Muller*, 7 Q. B. D. 92, under a contract for the sale of two thousand tons of pig iron to be delivered in November and through November, December and January, the buyer refused to take any iron in November, and the seller was justified in cancelling the contract. In *Freeth v. Burr*, 9 C. P. 208, which is a leading case, the defendant had agreed to sell plaintiffs two hundred and fifty tons of pig iron, one-half to be delivered in two and the remainder in four weeks, for net cash in fourteen days after delivery of each parcel. The market was rising and the delivery of the first half of the iron, agreed to be made in two weeks, was not completed for six months. For this reason the plaintiffs refused to pay for it according to the contract, claiming a set-off in consequence of loss they had sustained by the delay in delivery and by being forced to procure iron elsewhere. They still demanded the second half, but the defendant treated the refusal to pay for the first half as an abandonment of the contract and declined to deliver any more. It was held the refusal to pay for the first parcel did not, under the circumstances, warrant the seller in treating the contract as abandoned and plaintiffs were entitled to damages for the breach. It appeared in evidence the buyer had been anxious for the completion of the contract and the correspondence showed it had in-

sisted on compliance, but met only with excuses and resistance from the seller. Those were the circumstances which operated to prevent the buyer's refusal to pay for the first installment from being regarded as an abandonment of the contract, the seller being really the party in fault. It was in that case Lord COLERIDGE's oft quoted observations were made on the subject of what breaches of contract by one party will release another. He said:

"Where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract. I say this in order to explain the ground upon which I think the decision of these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, *viz*: that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. That is the true principle on which *Hoar v. Rennie* was decided, whether rightly or not upon the facts, I will not presume to say. Where by the non-delivery of part of the thing contracted for, the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract. . . . The principle to be applied in these cases is, whether the non-delivery or the non-payment amounts to an abandonment of the contract or a refusal to perform it on the part of the person so making default. That being so, and my Brother Brett having ruled that the mere non-payment for the first portion of the iron contracted for, unattended by any other act on the part of the purchasers,

did not put an end to the contract so as to disentitle the purchasers to maintain an action for the non-delivery of the second portion, but only gave the seller a remedy by cross-action (of which he has availed himself) I am of opinion that his ruling was correct, and that the rule should be discharged."

In *Mersey Steel & Iron Co. v. Naylor*, 9 Q. B. D. 649, 9 App. Cas. 434, the plaintiff had sold to defendant five thousand tons of steel to be delivered one thousand tons monthly and a delivery was made in January and February. Just before payment for these installments was due, the company became insolvent, a petition was presented to wind up its affairs, and defendant, acting on the advice of attorneys and thinking it could not safely pay under the circumstances, declined to do so unless the company obtained the sanction of the court. Thereupon the company gave notice it would consider the default as releasing it from further deliveries. Two things are held in this case: That payment for previous installments was not a condition precedent on the part of the buyer to claim the next one, and that by postponing payment under erroneous advice, respondent had not shown an intention to repudiate the contract so as to relieve the company from further performance. Commenting on the remarks of Lord COLERIDGE in *Freeth v. Burr*, it was said that to determine whether the breach of the contract amounted to abandonment of it to justify the opposite party in ceasing further to perform, "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from future performance of the contract by the conduct of the other; you must examine what that conduct is so as to see whether it amounts to absolute renunciation, an absolute refusal to perform the contract such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part." In *Railroad Co. v. Ontario Rolling*

Mills, 10 Ont. App. 677, the defendant had bought old rails from the plaintiff to be paid for as each one hundred tons were delivered. One thousand one hundred and fifty tons out of the one thousand three hundred tons bought having been consigned to the defendant, the plaintiff drew for the amount thereof at the agreed price, but the defendant refused to accept the draft under the mistaken belief it had not received a portion of the iron charged for. The court held this refusal was not, under the circumstances, such an act as to warrant the plaintiff to treat it as a repudiation of the contract; the court saying the test of the sufficiency of the breach for that purpose was "*not whether the conduct of one party was inconsistent with the contract, but whether the conduct of one party to the contract was really inconsistent with the intention to be bound any longer by the contract; that there must necessarily be a question of fact on the evidence in each particular case.*" The facts were examined by several judges and the conclusion reached they did not show the defendant had refused to pay what it owed, but rather had refused to pay what it considered to be an overdraft. In *Ballance v. Vanuxem et al.*, 191 Ill. 319, 90 Ill. App. 232, it appeared the appellees who were general agents for the New York Life Insurance Company in Illinois, had appointed Ballance a sub-agent over twenty-two counties for a year, unless the contract was terminated meanwhile by mutual consent or a violation of its terms. Before the end of the year controversies arose and Ballance withheld premiums collected by him, also failed to make reports on a number of policies. Thereupon the appellees gave notice the contract was terminated and they would commence suit to recover what Ballance owed them. The action having been instituted, Ballance claimed default in performance by the appellees themselves. The jury found against him and the Supreme Court held there was evidence to show he had breached the contract. The

lower court refused this instruction requested by him and the refusal was assigned for error on the appeal:

“The plaintiffs had no right to abandon or terminate the contract with the defendant because of a default by the latter in the performance of some covenant or covenants, unless the default were of such a nature as to defeat the whole purpose of the contract.”

As to the contention that the breach must have been total by Ballance in order to warrant a rescission by the appellees, the Supreme Court reviewed the various prior Illinois decisions and we will quote a part of the opinion, emphasizing a portion of the quotation:

“Appellant’s contention is that the failure of Ballance to comply with the contract must have been total to authorize a rescission by the appellees, and in support of the proposition, Selby v. Hutchinson, 4 Gilm. 319, and other cases containing similar language are cited. . . . But in Leopold v. Salkey, 89 Ill. 412, this court said: ‘The general remark made by the court (quoting it as above),’ (*i. e.*, from Selby v. Hutchinson), ‘is not understood as laying down the rule that to justify an abandonment of a contract, the opposite party must have failed to discharge every obligation imposed on him; but simply that matters which do not go to the substance of the contract and failure to perform which would not render the performance of the rest a thing different, in substance, from what was contracted for, do not authorize an abandonment of the contract; *for when the failure to perform the contract in respect to matters which would render the performance of the rest a thing different in substance from what was contracted for, so far as we are advised the authorities all agree the party not in default may abandon the contract.*’ See also Lake Shore & Michigan So. R. R. Co. v. Richards, 152 Ill. 59. As applied to the case at bar we are of the opinion the court properly refused to hold as law in the decision of the case

the proposition as presented: that it was not necessary that the appellant's default should be 'of such a nature as to defeat the whole purpose of the contract,' to entitle the appellees to terminate it."

In *Armstrong v. Coal & Iron Co.*, 48 Minn. 113, a contract had been made by which the defendant had agreed to sell to the plaintiff 10,000 tons of coal at certain prices for two grades, the coal to be received and paid for between June, 1885, and May 1, 1886. Certain modifications of the contract were made in the interim which resulted in a misunderstanding between the parties as to the prices, in consequence of which the plaintiffs refused to receive and pay for the balance of the 10,000 tons to be taken by them under the contract. In the action instituted by the plaintiffs for an alleged breach of the contract by the defendant in refusing to deliver six thousand tons of coal at prices which the plaintiffs alleged had been agreed upon, the defendant filed a counterclaim for the refusal of the plaintiffs to receive said balance at the original prices. It turned out on the facts the plaintiffs were in error about the extent of the reduction of prices made by the subsequent agreement from what they were fixed at by the original agreement; hence they failed in their action and the court instructed for a verdict on the counterclaim. The question on the appeal was the propriety of this direction. The court held that the plaintiffs had repudiated the contract in refusing, through a mistake of fact, to take and pay for the six thousand tons at the original price; hence could not recover from the defendant, but the latter might recover on its counterclaim for the repudiation, saying:

"That where one party to an executory contract repudiates it by refusing to be bound by its terms, the other party may take him at his word, and act upon it by treating the contract at an end, and bring an action for damages for its breach, is, of course, elementary.

The only question is what will constitute a repudiation? The true test, stated generally, is whether the acts and conduct of the party evinced an intention no longer to be bound by the contract, and the fair result of the authorities is that it is not only an absolute refusal in words to perform a contract, but *also any clear manifestation by words or acts of an intention not to perform it according to its terms*, that will authorize the other party to treat this as a repudiation and bring his action. . . . The legal effect of this" (i. e., plaintiffs' refusal to pay for offers of coal at the prices agreed on in the first contract) "was not changed by the fact that it was coupled with a profession that they were ready and willing to perform the contract; for manifestly the 'contract' which they asserted their willingness to perform was not the contract of the parties, but an entirely different one. Neither did it make any difference so far as concerned defendant's right to act on this as a repudiation, that it might not have been willful or fraudulent, but the result of a mistake as to the terms of the contract. In planting themselves on their own construction of it, the plaintiffs took their chances; and as it was in fact incorrect, they must stand the legal consequences of their acts. It is doubtless true that there may be acts of default in the performance of the strict terms of a contract which would not evince any intention to repudiate its obligations, and which consequently the other party would have no right to treat as a repudiation. An example of this is *Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas. 434, cited and relied on by plaintiffs. But this is clearly not such a case." (Italics ours.)

In *Graves v. Scott*, 80 Pa. St. 88, it was said if the part of a contract of sale that has failed is so essential to the residue that it cannot be supposed in reason the purchase would have been made without it, the contract is dissolved *in toto*. See, too, *Boulware v. Crohn*, 122 Mo. App. 571, 582. The most instructive opinion we

have found wherein this subject is treated is Lake Shore, etc., R. R. Co. v. Richards, 152 Ill. 59, reported also in 30 L. R. A. 33, with a luminous annotation. Richards was patentee of a process for weighing grain in bulk which was said to reduce the cost of weighing and transferring it from one railroad car to another. He had entered into a contract with the Lake Shore Company and among the various terms was an agreement by the company to adopt Richards' plan of weighing and transferring grain for all carloads of grain which should come to Chicago over western railroads for transportation eastward over the plaintiff's lines, and to allow him one-half of the saving which the device yielded. The Lake Shore Company also agreed not to make any use of the weights of such carloads of grain except for the purpose of billing the carloads through to destination. This contract was to last for a certain period, but in the interval the Lake Shore Company breached it by not using the process for weighing and transferring all carloads of grain which came from western roads to pass eastward over its lines, and also by using the weights of certain carloads ascertained by Richards' process for other purposes than to bill the carloads eastward to destination; that is to say, the Lake Shore Company gave the weights to the western railroads over which the grain had been transported to Chicago, thereby depriving Richards of the benefit of selling the weights to said western roads. The breaches were only partial, for the Lake Shore Company continued to use Richards' process for some grain received by it; nevertheless they were held to show an intention on the part of the Lake Shore Company not to be bound by the contract, and to defeat the consideration for which Richards had entered into the contract, and hence sufficient to entitle him to recover the profits that would have been earned if the arrangement had been carried out in full. The instructions approved in said case show the rules

of law the court deemed applicable to it and are suggestive of forms in instructions appropriate to the case at bar. The two controversies are alike in principle and the legal effect of the facts is the same in each.

From the foregoing pertinent and recent cases we conclude, that if a contract like the one in controversy is broken and the breach evinces an intention in the defaulting party not to be bound by stipulations whose non-observance will so far defeat the consideration for which the opposite party entered into the contract, that to make the latter keep the agreement will amount to coercing him to perform on terms which presumably he would not have accepted, he will be released from his obligation and may recover as though the contract had been carried out. See, too, *West v. Moser*, 49 Mo. App. 201, 211; *Hinckley v. Steel Co.*, 121 U. S. 264; *Easton v. Jones*, 197 Pa. St. 147; *Providence Coal Co. v. Coxe*, 19 R. I. 380; *Crowl v. Goodenberger*, 112 Mich. 683; *State v. Jones*, 21 N. E. 510; *Hughes v. U. S.*, 4 Ct. Cl. 64.

The remaining inquiry is whether the facts of the present case range it within those principles. To say these plaintiffs were bound to go on with the performance of the contract, though defendant had repudiated its obligation to accept D-stem handles, which obligation was part of the consideration that induced plaintiffs to enter into the contract and without which, presumably, they would not have entered into it, would require them to perform for another and less profitable consideration than the one they contracted for and are entitled to receive—would bind them by a contract they never made, which there is no reason to believe they would have made, and the execution of which likely would entail continual loss instead of profit, as a proportion of every lot of timber worked up would be wasted. We consider it manifest that if defendant rejected its obligation to take and pay for D-stem handles, as the triers of the fact might well find, this re-

nunciation went to the root of the consideration, amounted to an abandonment of the contract and relieved plaintiffs from their obligation further to perform.

The instructions granted on the second count indicate the court took this view, but the main one for plaintiffs was so drawn as to suggest that if the bare failure to take the one rejected carload forced plaintiffs to close their factory, plaintiffs might recover future profits. In this respect the instruction followed the petition which needs amending. Neither it nor the instructions expressed clearly the doctrine that plaintiffs must have been prevented from keeping their obligation by conduct of defendant showing it would refuse to accept D-stem handles if plaintiffs continued to manufacture and offer them.

Counsel for defendant contend if plaintiffs are entitled to recover for future profits, the measure of their damages would be the difference between the prices at which they sold to defendant and the prices which they could have obtained from other buyers. The law is otherwise, the measure of damages in such case having been established by several decisions of authority in this state; and applied to the facts of the present case, it is the difference between the cost to plaintiffs of manufacturing the handles and putting them on the cars and the prices they were to receive. [Black River Lumber Co. v. Warner, Chapman v. Railroad; Berthold v. Elec. Const. Co.; Gabriel v. Brick Co.; supra.]

III. We will consider next the counterclaim set up in defendant's answer to the contract of October 28, 1904. The answer says plaintiffs agreed to manufacture and sell to defendant during the time named in said contract, their entire output of long ash handles and start up their factory and make them; that defendant agreed to buy all said handles and pay designated

prices therefor when delivered free on board cars at Manila, it being estimated the factory would turn out from 600,000 to 1,000,000 handles; that plaintiffs neither sold or delivered nor offered to sell or deliver, any handles under said contract, though defendant was ready and willing to receive and pay for same; but plaintiffs wholly refused and neglected to comply with it; that had they complied, and operated their factory as they agreed, they would have turned out at least 600,000 handles and defendant would have realized a profit of six dollars per thousand or \$3600, for which it prayed judgment. The defenses to said counterclaim set up in the reply were: First, that defendant failed to furnish plaintiff any specifications for the handles to be manufactured, though the contract required this to be done, and by reason of the failure plaintiffs were unable to manufacture handles, hence were not liable to defendant in damages; second, at the time of signing the contract and as a condition precedent to its taking effect, and part of the consideration for it, plaintiffs stipulated in writing defendant should pay plaintiffs for handles on hand the sum of \$616, payment of which had theretofore been promised; that defendant failed, neglected and refused to pay said sum to plaintiffs or any part of it, by which plaintiffs were released from the performance of the contract to defendant and are not liable in damages on it; third, the contract of October 28, 1905, was obtained from plaintiffs through false and fraudulent representations made to deceive them, in that defendant promised to pay them over six hundred dollars for handles on hand, for which they had been seeking payment; the general manager of defendant sought an interview with plaintiffs, and, as an inducement to plaintiffs to enter into the contract of October 28, 1905, promised to receive and pay for said handles and relying on this promise plaintiffs signed the contract; defendant had no intention of receiving said handles and falsely agreed

to receive same in order to induce plaintiffs to sign the contract; thereafter defendant never received or paid for the handles; wherefore the contract was alleged to be of no effect and the court was prayed to decree it null and void. The instruction granted at plaintiffs' instance on the counterclaim, submitted those three defenses in the alternative and told the jury, in effect, if they found either of them had been established, defendant could not recover on its counterclaim. It will be perceived two defenses of a legal and one of an equitable nature, were united in a single count of the replication; which was bad pleading, but no objection was taken to it. However, as the reply asked affirmative relief in connection with the equitable defense, that matter should have been heard and determined by the court. [Wendover v. Baker, 121 Mo. 273, 25 S. W. 918.] Really the equitable plea and the legal defense that the second contract never went into effect because the condition precedent was not performed, rested on the same facts. The fraud alleged to have been practiced on plaintiffs as an inducement to enter into the contract and which rendered the latter void, was the promise of defendant to accept and pay for handles on hand, which was likewise the supposed condition precedent to the contract becoming operative. Both defenses ought not to be insisted on, but only the one best supported by the evidence. We have set out in the statement what Laswell testified about the execution of the second contract, and this testimony, in connection with the letter of defendant inclosing the copies of the contract and the letter of plaintiffs returning one copy executed, are all there is in the record about this matter. We find nothing in either from which to infer payment of the handles on hand was a condition precedent to the contract taking effect. The effect of what Laswell testified was that Durell said if plaintiffs would sign the contract for another year, he would give them shipping directions for the handles and they ex-

pected to get the price of the handles and reopen their factory with it. Durell's letter inclosing the copies for signature asked plaintiffs to sign them and said on receipt of a copy duly signed, defendant would give shipping directions for the handles about which they had been corresponding. Plaintiffs' letter returning a signed copy, asked shipping directions, saying plaintiffs could not start up until they got pay for the handles. It is plain these bits of testimony are insufficient to prove an agreement was made that the second contract should not go into effect until the handles plaintiffs had on hand were accepted. But the letter and the testimony, and, indeed, all that transpired between Laswell and Durell, very strongly incline to prove plaintiffs were induced to execute the second contract on the promise of Durell to pay for those handles. Plaintiffs had been trying for more than a year to get pay for them and defendant knew they could not resume operations until payment was made. Payment was the burden of the conversation between the two men at the Blythesville meeting. Promises of something to be done in the future are not always ground for the rescission of the contract; but where a promise is made under such circumstances as this one was, with no intention to perform it, but with a fraudulent design to obtain a contract by giving the promise and then breaking it, those facts are ground of rescission. [Bispham, Equity, sec. 211; 31 Am. St. Rep. 39; 38 Am. St. Rep. 116; 55 Am. St. Rep. 406; 87 Am. Dec. 738; Chicago, etc., R. R. v. Titterington, 84 Tex. 218, 19 S. W. 472; Wilson v. Eggleston, 27 Mich. 257; Grove v. McKee, 53 Miss. 536; 14 Ency. Law, pp. 15 to 54.] If plaintiffs are to be believed, and there is much to corroborate them, Durell knew the utter impossibility of their even beginning to perform the new contract until they were paid for the handles already made; and if he procured the contract by promising what he did not mean to keep, he intended to tie plain-

tiffs up in an obligation which, by his own wrong, he would prevent them from performing; thereby lay them liable in damages and enable defendant to escape the consequences of the breach of the first contract for which plaintiffs' attorneys were threatening to sue.

As regards the defense to the counterclaim that defendant never furnished any specifications for the handles under the second contract, suffice to say Durell testified he inserted all the necessary specifications in the contract and the attached schedule, and the testimony of plaintiffs themselves was inconsistent with the notion that they did not furnish handles under said contract because of a lack of specifications. The reason they assigned for not furnishing them was because, in their view, the contract was not binding.

The judgment is reversed and the cause remanded with leave to plaintiffs to amend the second count of the petition and their reply, if so advised, and with directions to the court to retain the verdict on the first count of the petition and retry the cause of action set up in the second count and in the counterclaim. All concur.

JOSEPH SEIGFRIED et al., Respondents, v. THE
CHICAGO, BURLINGTON and QUINCY RAIL-
ROAD COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted March 3, 1910.
Opinion Filed March 22, 1910.

1. **COMMON CARRIERS: Freight: Stoppage in Transit: Sufficiency of Evidence.** In an action against a carrier for damages for delivering goods to the consignee after they had been stopped in transit by the shipper, evidence *held* to sustain a finding that the consignee was insolvent when the order to stop the shipment was given.

Seigfried v. Railroad.

2. ———: ———: ———: **Proof of Insolvency.** Strict proof of insolvency is not essential to exercise the right of stoppage *in transitu*; "insolvency" in that sense meaning general inability to pay debts.
3. ———: ———: ———: **Evidence: Similar Transaction.** In an action against a carrier for damages for delivering goods to a consignee, after they had been ordered stopped while in transit by the shipper, the exclusion of evidence tending to show that in previous transactions between the shipper and the consignee the latter had made prompt payment was not erroneous, since it had no tendency to show the shipper had knowledge of the consignee's insolvency when the goods were sold.
4. ———: ———: ———: **Knowledge of Consignee's Insolvency.** The right of stoppage *in transitu* does not exist even though the buyer is insolvent, if that fact was known to the seller at the time the sale was made.
5. ———: ———: ———: **Estoppel to Deny Right.** Where the carrier, on being told by the shipper that he feared the consignee's insolvency, and on request to stop the goods in transit, promised to stop them upon the shipper surrendering the bill of lading with a signed order to stop the goods indorsed thereon, and afterwards told him that the goods had been stopped, it was estopped from thereafter denying the shipper's right to stop the shipment on the ground of want of proof of insolvency, or of knowledge by the shipper thereof when he directed the goods to be stopped, for by these acts and declarations the carrier prevented the shipper from protecting himself in some other way, if the right of stoppage had been denied or the right to exercise it challenged.
6. ———: ———: ———: **Liability for Mis-Delivery: Defenses.** A carrier may show as a defense to an action for damages for delivering goods to the consignee, after they had been ordered stopped in transit by the shipper, that the goods had been delivered to the consignee before it was notified to stop the shipment and before it had time to communicate with its agent at destination.
7. ———: ———: ———: **Delivery to Carrier: Bill of Lading: Evidence.** A bill of lading issued by a railroad company, returned to it on its demand when the shipper requested the goods to be stopped in transit, was *prima facie* evidence that the company had received the goods for shipment.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. H. Williams*, Judge.

AFFIRMED.

Robert & Robert and *Wm. L. Bechtold* for appellant.

(1) The delivery of goods to a common carrier for transportation to the purchaser passes title to the latter and is equivalent to delivery to the purchaser, subject only to the right of stoppage *in transitu*. *Scharff v. Meyer*, 133 Mo. 428; *Bank v. Smith*, 107 Mo. App. 188; *Cultivator Co. v. Railroad*, 64 Mo. App. 305. (2) "Right of stoppage *in transitu* arises solely upon the insolvency of the buyer." 4 *Elliott on Railroads*, p. 2390; *Hutchinson on Carriers*, sec. 421; *Heinz v. Transfer Co.*, 82 Mo. 233; *Smith Co. v. Railroad*, 122 S. W. Rep. 342; *Grocer Co. v. Railroad*, 122 S. W. 10; *Cultivator Co. v. Railroad*, 64 Mo. App. 305; *Scott Bros. v. Grimes D. G. Co.*, 48 Mo. App. 521; *Estey v. Truxel*, 25 Mo. App. 238; *Armentrout v. Railroad*, 1 Mo. App. 158. (3) Plaintiff's petition is not based on defendant's common law liability. The allegations of the petition as to negligence on the part of the defendant are not supported by proof. It was incumbent on plaintiff to prove the negligence alleged. *Hasse v. Transportation Co.*, 122 S. W. Rep. 362; *Clark v. Railroad*, 122 S. W. Rep. 318; *Milling Co. v. Transit Co.*, 122 Mo. 258; *Whiting v. Railroad*, 101 Mo. 631; *Hurst v. Railroad*, 117 Mo. App. 25; *McCrary v. Railroad*, 109 Mo. App. 567; *Ryer v. Railroad*, 54 N. Y. Supp. 583, affirmed, 56 N. Y. Supp. 1083.

J. Carter Carstens for respondents.

(1) While the right of stoppage *in transitu* arises only upon the insolvency of the buyer. In order to exercise the right it is not necessary that the buyer should have been adjudicated a bankrupt, or made an assignment for the benefit of his creditors. (a) It is

sufficient if his conduct in business affords the ordinary evidences of insolvency. *Diem v. Koblitz*, 49 Ohio St. 41-51, 29 N. E. 1124; *C. F. ex parte Carnforth*, 4 ch., D. 108-122. An inability to pay avowed either in act or word. *Burdiet on Sales (Cases)*, 617; *Durgy Cement, etc., v. O'Brien*, 123 Mass. 13; *Lee v. Kilburn*, 3 Gray, (Mass.) 600; *Thompson v. Thompson*, 4 Cush. (Mass.) 134; *Herrick v. Barst*, 4 Hill N. Y. 650; *Benedict v. Schaettle*, 12 Ohio St. 515; *Bloomington v. Railroad*, 6 Lee (Tenn.) 616; 6 Am. and Eng. Rwy. Cases, 371; *Gibson v. Carruthers*, 8 M. and W. 329; *Mills v. Ball*, 2 B. and P. 457; *Bailey v. Schofield*, 1 M. and S. 338; *James v. Griffen*, 2 M. and W. 622; *Parker v. Gassage*, 2 C. M. and R. 617; *Hayes v. Mouillee*, 14 Penn. 48; *Nelson v. Demie*, 8 Pick. Mass. 205; *Reynolds v. Railroad*, 43 N. H. 580. (b) Although the buyer has not actually failed nor had his paper protested, still, if his conduct in business affords the ordinary evidence of insolvency, that is sufficient to justify the stoppage of the goods *in transitu*. *Burdiet on Sales* (2 Ed.), sec. 391, p. 237. (c) Well-founded information of the embarrassment of the buyer is sufficient to warrant the seller to stop the goods in transit. *Moore v. Lot*, 13 Nev. 383; *Secomb v. Nutt*, 414 B. Mon. (Ky.) 261. (d) It is the duty of the carrier to act upon the demands of the vendor (and his assertion that the buyer is insolvent) and to yield to the demand. 4 *Elliott on Railroads*, p. 2390, secs. 15-39; *Jeffries v. Railroad* (Wis.), 67 N. W. R. 424; 12 Natl. Corp. R. 691; *In re Pray*, 27 Fed. Rep. 474; *The Tigres Browning and L.* 38. (2) Allegations of negligence in petition are mere surplusage. The cause of action was complete when it stated the demand of stoppage, the agreement of the carrier to stop, its failure to stop, and the loss of the purchase price. Besides, the action originated in a justice court, where no formal pleadings are required. (3) The objection that the consignee was not insolvent at the time the stoppage was ordered can only be taken

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by the buyer, and not by the carrier, except the carrier may show as a matter of defense that the vendor could have collected his money. *Bloomington v. Railroad*, 6 Lee (Tenn.) 616; 6 Am. and Eng. Ry. Cases, 371; 5 Wait's Action & D., p. 614. (4) It is prudent for the carrier to hold the goods till the validity of claim is established. *Bohllingt v. Inglis*, 3 East 381; *Sneyds v. Hay*, 4 J. R. 260; *Snee v. Prescat*, 1 Atk. 250; *Reynolds v. Boston, etc., R. R.*, 591; *Chandler v. Fulton*, 10 Texas 2; *B. V. Mass.*, 5 Whar. 189; *Rucker v. Donovan*, 13 Kas. 251; *Newhall v. Vargas*, 13 Me. 93; *Mottram v. Heyer*, 5 Denio 629; *Bierce v. Hotel Co.*, 31 Cal. 160.

STATEMENT.—This action was commenced before a justice of the peace in the city of St. Louis, and from a judgment therein rendered in favor of plaintiffs, defendant appealed to the circuit court, where the trial was had before the court, a jury being waived. The statement on which the case was tried sets out that on the 4th of March, 1907, plaintiffs shipped to one Schlechter, at Rock Island, Illinois, a certain box of merchandise by and through the defendant corporation; that on the 5th of March, plaintiffs notified the defendant to stop said shipment "which the defendant, through its agents and servants, represented it had done immediately upon the notification of the plaintiffs to the defendant," but that the defendant had failed to hold the merchandise and had carelessly and negligently delivered it and permitted it to leave its care and custody and go beyond its control, to plaintiffs' damage in the value of the merchandise (\$150.55), for which and costs they prayed judgment. Accompanying the statement was the itemized account. There was no paper pleading by defendant.

At the trial before the circuit court, it appeared that on the 3d of March, 1907, Schlechter had bought the bill of goods of the plaintiffs, the testimony being

that the reasonable value thereof was as set out in the account filed. On the 4th of March the goods were delivered by plaintiffs to the defendant, through the St. Louis Transfer Company, for transportation to Schlecter, at Rock Island, they having left the warehouse of plaintiffs between three and four o'clock of the afternoon of that date. About two o'clock on the afternoon of the fifth of March, the plaintiffs received a report from the Dun Mercantile Agency as follows:

"Schlechter, M. Clo. Shoes, etc. Rock Island, Rock Island Co., Ill. February 26, 1907. Store closed about one week ago and understood to have moved stock to Peoria, Ill. 2928919079 J. L. R. —;— to N. Q. 6409—2770—4408—2765—

R. G. Dun & Co."

Upon receiving this, a member of the firm of plaintiffs and hereafter referred to for brevity as plaintiff, went to the St. Louis Transfer Company's office to inquire whether the shipment was still in possession of that company. Not finding it there, he went directly to the freight office of the defendant and told the agent in charge that he would like to have the goods stopped. The agent asked him for what reason. Plaintiff showed him the above report from Dun's Agency, and stated that to his knowledge the man wanted to swindle them out of the goods. The agent said, "All right," that he would stop the goods for them, and asked plaintiff whether he had the bill of lading, and told him to produce it to him, saying that it was absolutely necessary that plaintiffs should give up the original bill of lading to him, whereupon plaintiff delivered the bill of lading to the agent of defendant, and at the direction of that agent, wrote a notation on it to the effect, "We hereby ask you to stop these goods," signing this in the firm name. That was about half past three or four o'clock of the afternoon of March 5th. About five o'clock, wanting to be sure that the goods would be stopped, this partner went again to the railroad agent, who

showed him a duplicate of a telegram to the agent of the defendant company at Rock Island, Illinois, in which the agent of the defendant here had requested the agent of the defendant at Rock Island to stop the goods sent to Schlecter from plaintiffs. On that same day, the 5th, plaintiffs wrote to Schlecter at Rock Island, Illinois, a letter as follows:

“St. Louis, Mo., March 5, 1907.

“Mr. M. Schlecter, Rock Island, Ills.

“Dear Sir: You no doubt have received our bill for the goods by this time, but it was reported to us from the agencies that your store is already closed up a week and your stock moved to Peoria, Ills., and this certainly is a puzzle to us, as we cannot understand when you move your stock to Peoria, why you wish to have the goods shipped to Rock Island, and under the circumstances we have no other way but to stop the goods, as we don't know what is what, and you cannot blame us for our actions. Now, Mr. Schlecter, although the bill is marked net 30 days, as those are jobs, and same were sold to you almost below cost, yet if you wish to have those goods, you may send us a St. Louis or Chicago draft, and take 5 per cent. The amount is \$150.55 and 5 per cent would be \$7.52, and the net amount would be \$143.03, and this is a big inducement. Please let us hear from you by return mail, as this is rather important.

“Yours very truly,

“Seigfried & Rosenberg.”

There was testimony on the part of plaintiffs that they had never received the goods back and that they had since learned that the goods had been delivered to Schlecter and they had never received any money for them. On cross-examination, the witnesses testified that they had sold Schlecter before and that he had made prompt payments for the goods that had been sold him. On objection and motion of plaintiffs this last answer was stricken out as immaterial, defendant

saving its exception. This was all the evidence in the case. No declarations of law were asked or given. The court found in favor of plaintiffs and entered up judgment in their favor for \$158.15 and costs. Defendant in due time filed its motion for a new trial which being overruled, exception was saved and an appeal duly perfected to this court.

REYNOLDS, P. J. (after stating the facts).—The assignments of error may be summarized to be that there was no evidence showing the insolvency of the consignee and that without insolvency there is no right of stoppage in transit, it being also assigned as error that the court had excluded competent and relevant testimony to show that plaintiffs had no knowledge that the consignee was insolvent when they attempted to stop the shipment, and that there was no evidence tending to show that the defendant received for transportation the goods claimed to be lost. None of these assignments are maintainable.

Counsel on each side concede that the right of stoppage in transit must depend, among other facts, on the fact of the insolvency of the consignee. The report from the Dun Agency, the fact that on the very day Schleter bought the goods, he no longer had his store at Rock Island, but had removed from there to Peoria about a week before; that he made no answer to the letter of March 5th from plaintiffs to him, and that the goods, although delivered, had not been paid for down to the institution of this suit before the justice, which was about April 9, 1908, over thirteen months after they had been bought, are all circumstances from which the court had a right to draw the conclusion that the consignee was insolvent when the order to stop the shipment was given.

Mr. Elliott, in his work on railroads, vol. 4 (2 Ed.), sec. 1539, states the conclusion of the authorities on the right of stoppage in transit, to be that the right

“does not exist, even though the buyer is insolvent, if that fact was known to the seller at the time the sale was made.” He refers to the case of *Jeffries v. Fitchburg Railroad Co.*, 93 Wis 250, as instructive authority on this proposition of insolvency. Referring to that case, at page 256, it is stated: “Strict proof of insolvency is not required in order to justify the exercise of the right of stoppage *in transitu*. ‘By the word ‘insolvency’ is meant a general inability to pay one’s debts; and of this inability the failure to pay one just and admitted debt would probably be sufficient evidence.’ [Benj., Sales, sec. 837; Smith, Merc. Law, 550, and note.] It had failed to pay the just and undisputed debts it had owed to the plaintiff and to the defendant for over ten months. Inquiry made at the former place of business of the debtor elicited the information that there was no such concern; . . . and the fact that the witness, . . . connected with it during its corporate existence and having some knowledge of its business, called to show that the right of stoppage had been terminated by delivery to the company or its agent, was not interrogated as to its solvency, is quite suggestive, in view of the facts in evidence, when fairly satisfactory proof of its solvency would have been fatal to the plaintiff’s action. The evidence constitutes sufficient *prima facie* proof of insolvency to sustain the finding. There was no attempt made to dispute this evidence or to rebut it. We must hold that the evidence was sufficient to warrant the finding.”

It seems to us that the facts in the case at bar are sufficiently near to those in the *Jeffries* case to apply the rule there laid down in this case.

We are unable to understand what the assignment, that the court erred in excluding competent and relevant testimony to show that plaintiffs had no knowledge that the consignee was insolvent, refers to. The only evidence that was excluded was that offered by defendant in cross-examination of one of the plaintiffs,

in which defendant undertook to show previous transactions between plaintiffs and Schlecter. If the evidence had tended to show knowledge on the part of plaintiffs of the insolvency when the goods were sold, it would have been relevant, as before stated. But the effort was to show solvency. It was properly excluded. This is all of the evidence on that line that appears from the record to have been offered.

Furthermore the judgment can be sustained on the ground that the defendant is estopped from invoking the law applicable to the right of stoppage in transit which exists as between the consignor and the consignee. When one of the plaintiffs went to the agent of defendant and notified them of his suspicions and fears, those agents not only told him that they would stop the goods but that they had done so, and insisted upon his delivering over to them the bill of lading which he had in his possession, and on plaintiff's endorsing on it over the signature of plaintiffs, the order to stop delivery. In the light of this, defendant is certainly estopped from now denying the right of plaintiffs to stop the shipment, either because there was no proof of insolvency or knowledge on the part of plaintiffs at the time of the fact of insolvency was lacking, for by these acts and declarations of its agents, defendant prevented plaintiffs from protecting themselves in some other way, if the right of stoppage had been denied or the right to exercise it challenged. It was open to defendant to have shown that before notification by the plaintiffs and before communicating with the agent of the defendant at Rock Island, delivery had been made to the consignee. It did not choose to introduce any such evidence, if there was any to that effect, and it stands here without any substantial defense to the plaintiffs' claim.

As to the point made that there was no proof of delivery of the goods to defendant, the bill of lading turned over by plaintiffs to defendant and at its de-

mand was most surely prima facie evidence that defendant had received the goods for transportation.

The judgment of the circuit court is affirmed. All concur.

**MICHAEL KELLEHER, Appellant, v. UNITED
RAILWAYS COMPANY OF ST. LOUIS, Re-
spondent.**

St. Louis Court of Appeals. Argued and Submitted March 14, 1910.
Opinion Filed March 22, 1910.

1. **APPELLATE PRACTICE: Awarding New Trial: Discretion of Trial Court: Excessive Damages.** The matter of awarding a new trial on the ground of excessive damages is so entirely within the discretion of the trial court that an appellate tribunal will interfere only in the very clearest case of an abuse of discretion.
2. ———: ———: **Reason for Granting New Trial: Conclusiveness of Record.** The court on appeal from an order granting a new trial is governed by the record entry of the trial court giving the reasons for its ruling.
3. ———: ———: **Discretion of Trial Court: Excessive Damages.** In an action by a passenger for assault by a street car conductor, the verdict was for plaintiff for \$300 actual and \$300 punitive damages. A motion for new trial on the grounds of excessive recovery and error in permitting punitive damages was ordered sustained on both grounds, unless plaintiff remitted all punitive damages. *Held*, that this should be construed as a holding that, while the court thought no punitive damages should be awarded and that \$300 actual damages was excessive, he would let the verdict stand for \$300, and, as so construed, it was an exercise of the discretion of the court, which will not be reviewed on appeal.
4. **CARRIERS OF PASSENGERS: Assault on Passengers: Punitive Damages.** In an action by a street car passenger for an assault committed by the conductor, evidence *held* to authorize the submission to the jury of the question of punitive damages.

Appeal from St. Louis City Circuit Court.—*Hon. Wm. M. Kinsey*, Judge.

AFFIRMED.

John E. Murphy and *Blevins & Jamison* for appellant.

(1) Under the evidence it was for the jury to determine whether or not punitive damages should be assessed against the defendant. The court erred, therefore, in setting the verdict aside on the ground that the plaintiff was not entitled to punitive damages. *Yeager v. Berry*, 82 Mo. App. 534; *Prentiss v. Shaw*, 56 Me. 427; *Summerfield v. Transit Co.*, 108 Mo. App. 718; *Carmody v. Transit Co.*, 122 Mo. App. 338; 2 *Sutherland on Damages* (3 Ed.), sec. 391; *Burke v. Melvin*, 45 Conn. 246. (2) The court's action in ordering that plaintiff remit the \$300 punitive damages awarded by the jury and that upon failure to do so the defendant's motion for new trial would be sustained on the grounds that the damages were excessive and that plaintiff was not entitled to recover punitive damages, was erroneous and inconsistent, to say the least, and should not be sustained by this court. The fact that the court by such order, in effect held that the compensatory damages were not excessive, but that the whole of the punitive damages should be remitted because excessive, and that plaintiff was not entitled to recover any punitive damages, clearly establishes such error and inconsistency. (3) This court will look to the whole of the record to ascertain the grounds upon which the motion for new trial was sustained. The record shows that the trial court sustained the motion for a new trial on the ground that plaintiff was not entitled to punitive damages, and because plaintiff refused to remit that part of the verdict allowing him punitive damages. If the trial court was in error in this regard, the case should be reversed and remanded.

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Sessinghaus v. Knoche, 137 Mo. App. 323. (4) This case was well tried and the verdict was for the right party. There is no error anywhere in the record, and the verdict of the jury should not have been set aside. The plaintiff was entitled to a trial by jury, and the action of the court setting aside the verdict, under the circumstances, was erroneous, arbitrary and an abuse of any discretion and power conferred upon it by law. Hill v. Wilkins, 4 Mo. 86; Ittner v. Hughes, 133 Mo. 689; Taylor v. Gossett, 114 Mo. App. 723; Richardson v. Brick Co., 122 Mo. App. 529; Whitsett v. Ranssem, 72 Mo. 358; Morris v. Railroad, 136 Mo. App. 398; Herndon v. Springfield, 137 Mo. App. 522. (5) The case was fairly tried, there was no error in the record, and the verdict was for the right party. The damages under all these circumstances were very modest, but, if the damages, either compensatory or punitive, are excessive, this court may now make such order in respect thereto as the evidence requires, and thereby avoid another trial of said cause. Chitty v. Railroad, 166 Mo. 435; Braghill v. Norton, 175 Mo. 190; Barnes v. Lead, 107 Mo. App. 614.

Boyle & Priest, F. S. Whitelaw and G. T. Priest
for respondent.

(1) As to the first ground that the verdict was excessive. A judge, *nisi prius*, has the power of exercising, in his supervision of actions before him, a very broad discretion, which an appellate court will not interfere with, if exercised over matters of fact, and not clearly abused. Loftus v. Railroad, 119 S. W. 942; Kirn v. E. E. Iron Co., 124 S. W. 45; Schuette v. Transit Co., 108 Mo. App. 21; Schuette v. Transit Co., 108 Mo. App. 186; Fitzjohn v. Transit Co., 81 S. W. Rep. 908. It is axiomatic that the excessiveness of a verdict involves a question of fact and the trial court having said that the verdict rendered in this case was

excessive, this court will not interfere with the use of his discretion in that respect. (2) As to the second ground on which the court granted a new trial, namely, plaintiff was not entitled to punitive damages. This ruling can be upheld on the authorities and argument set out under point one. All of defendant's witnesses testified that plaintiff without provocation, called the conductor vile and abusive names, which, if true, would bar plaintiff from recovering punitive damages. *Mitchell v. Transit Co.*, 125 Mo. App. 1.

REYNOLDS, P. J.—This is an action to recover damages for injuries alleged to have been sustained by plaintiff by reason of the alleged fact that a conductor in charge of a car which he was operating for defendant on its street railway, did “violently, maliciously and willfully commit assault and battery upon plaintiff in this, that the said conductor struck the plaintiff a blow with his fist in the mouth with great force and violence, causing five of the plaintiff's teeth to be loosened so that all five of said teeth had to be extracted.” It is alleged that this occurred while plaintiff was endeavoring to alight from the car in charge of the conductor and that in consequence of said blow plaintiff lost his hold on the handrails of the car and was caused to fall and be violently thrown to the pavement of the street with such force that he was injured about the face and head and right side of his body at or about the junction of the tenth or eleventh ribs with the costal cartilage; and that in consequence plaintiff had suffered excruciating physical pain and mental anguish and still suffers the same; that he received a serious shock to his nervous system and that the injuries were inflicted upon plaintiff by the conductor while he was in discharge of his duties as the agent and servant of the defendant. It is further averred that in consequence of his injuries plaintiff has been compelled to and in fact will be compelled to

incur large expenses for medical treatment of the injuries and for medicines in the treatment thereof, the amount of which he is unable to specify as he is still under the charge of a physician on account of said injuries. He prays actual damages in the amount of five thousand dollars and a like amount in addition as punitive damages.

The answer is a general denial.

At the trial of the case there was evidence tending to prove the allegations of the petition, except that it appears from an instruction given by the court that the pushing of plaintiff off of the car by the conductor was not relied on as a ground for recovery. On the part of defendant there was evidence tending to show that the plaintiff and conductor of the car had a quarrel and that while plaintiff was getting off the car, he used offensive language to the conductor, who protested against the language used by plaintiff and told him if he was not an old man he would strike him, but that he did not strike him, merely putting his hand on the plaintiff as he stood on the step of the car; that plaintiff did not fall nor was he pushed or thrown to the ground.

There was a verdict for plaintiff for three hundred dollars actual and three hundred dollars punitive damages. Defendant in due time filed a motion for a new trial in which the fifth and seventh grounds assigned are, "5th. Because said verdict is excessive. 7th. Because the court erred in permitting the jury to return a verdict against defendant for punitive damages herein." The court thereupon by entry of record ordered "that unless plaintiff should remit within ten days from that date the punitive damages awarded plaintiff by the jury in the sum of three hundred dollars, that defendant's said motion for a new trial would be sustained by the court on the fifth and seventh grounds specified therein." Plaintiff refusing to remit, a new trial was

awarded, from which action of the court in awarding the new trial, plaintiff, saving his exception, has duly appealed to this court.

The matter of awarding a new trial on the ground of excessive damages is so entirely within the discretion of the trial court that an appellate tribunal will interfere with that action only in the very clearest case of an abuse of that discretion. [Loftus v. Railway, 220 Mo. 470, 119 S. W. 942; Kirn v. E. E. Souther Iron Co., 146 Mo. App. 451, 124 S. W. 45; Schuette v. St. Louis Transit Co., 108 Mo. App. 21, 82 S. W. 541; Schuette v. St. Louis Transit Co., 108 Mo. App. 186, 83 S. W. 297; Fitzjohn v. Transit Co., 183 Mo. 74, 81 S. W. 907.] It may be true, as argued by the learned counsel for the appellant, that the court was controlled in its action entirely by the view that it took that this was not a case for punitive damages, but that is not what the court has said in the record entry and we must be governed by that.

As will be noted above, the entry of record of the court was that the motion for a new trial would be sustained by the court upon the 5th and 7th grounds specified in the motion for new trial unless plaintiff remitted all of the punitive damages. This may be construed as meaning that while the court thought no punitive damages should be awarded at all, he had concluded that with these remitted he would allow the verdict to stand for the three hundred dollars actual damages, even though he thought that was excessive. He undoubtedly held that unless the three hundred dollars was remitted from the verdict, the whole verdict was excessive. Plaintiff took issue on this and elected to stand by his verdict. As the case will have to be retried, we do not think it proper to comment at length on the instructions. As to the conclusion of the court that punitive damages under the facts in evidence should not be awarded, we hold that on the facts in evidence it is a question for the jury whether plaintiff, if the issues are

found for him, was entitled to punitive damages, as well as actual. On a retrial the facts may develop otherwise than as shown on this. It is sufficient to say for the purposes of the present case, that the sustaining of the motion for the new trial upon the grounds stated was within the undoubted judicial discretion of the learned trial judge, and we cannot say that that discretion was either arbitrarily or improperly exercised. That being so, the action of the circuit court in sustaining the motion for new trial is affirmed. All concur.

E. G. BRAUCKMAN, Appellant, v. HARGADINE,
McKITTRICK DRY GOODS COMPANY, Re-
spondent.

St. Louis Court of Appeals. Argued and Submitted March 7, 1910.
Opinion Filed March 22, 1910.

APPELLATE PRACTICE: Trial Court's Finding, on Conflicting Evidence, Conclusive. There being conflicting evidence, from which different conclusions might be drawn by the trier, the conclusion thereon of the trial court will be followed.

Appeal from St. Louis City Circuit Court.—*Hon. Wm. M. Kinsey*, Judge.

AFFIRMED.

John H. Drabelle for appellant.

Johnson, Rule & Allen for respondent.

REYNOLDS, P. J.—This case was before this court on appeal by defendant and is reported 91 Mo. App. 454. The pleadings and evidence differ so slightly from those on the former trial, and are so fully set out in the report, that it will serve no useful purpose to go over them, even to the extent of pointing out the

differences now exhibited, save to remark that two causes of action formerly thought to have been embraced in one count are now stated in two counts of the petition, one founded on the rental claimed to be due for the use of the plant, the second count founded on a charge for the use of additional arc and incandescent lamps. The case was tried, on being reversed and remanded, before the court, a jury being waived, on the transcript of the testimony given at the former trial, with some slight additional testimony, mainly directed to explanation by plaintiff as to the discounting of rentals, it being to the effect that in October, 1897, following out a custom between the parties to discount the rental in advance, the monthly bills for December, 1897, and for January, February, March and April, 1898, at the rate of \$175 per month, had been discounted, and that this had been done January 20, 1898, on the rentals for the months of May and June, 1898, the rental as well as the charge for the extra lamps, and some service charges, being discounted, the rental for those months being carried at the rate of \$175 per month and not at \$150. There was also some additional evidence by plaintiff to the effect that at the time of the discounting of these notes with the rental at the \$175 rate, nothing was said on either side as to whether the occupancy was to continue after the 1st of December, 1897, under a new arrangement or tenancy, or whether that tenancy continued under the original contract.

When the case was reversed before, as will be seen by referring to the report of the decision, it was for the refusal of the court to give an instruction asked, it being held that that refusal rendered it impossible to determine upon what theory of law the court decided the case, this court saying, at page 466, that the vital question in the case was whether or not respondent had exercised its option to renew the contract for a year or longer or to continue the use of the plant from month to month under a tacit understanding with re-

spondent that it might do so. At the present trial before the court, the instruction referred to was given, with very slight verbal changes, and the learned trial judge, among other declarations of law given on his own motion and on motion of defendant, gave the following:

“The court of its own motion declares the law to be that under the decision rendered in this case by the St. Louis Court of Appeals at its October Term, 1901, to-wit, on the 7th of January, 1902, there is now but one question for decision by this court, and that is one of fact, *viz.*, whether as claimed by plaintiff, the defendant exercised its option under the written contract between plaintiff and the defendant, dated July 22, 1895, and read in evidence, to hold and use the lighting plant referred to in said contract for one year from and after December 1, 1897, at a monthly rental of \$150 per month, or whether, as claimed by defendant, it held and used said plant after said date from month to month with the consent of plaintiff, and at a monthly rental of \$175 a month.

“Upon this question the court finds in favor of defendant under the evidence adduced, and further finds that defendant has paid the plaintiff in full for the hire of said plant during the time the same was used by it.”

No declarations of law appear to have been asked on the part of the plaintiff, he resting on the errors of the court in giving the declarations of law above referred to. After judgment in favor of defendant, plaintiff filed his motion for a new trial which was overruled, exception duly saved and he has appealed to this court.

The substantial errors assigned in the motion for new trial and urged here are to the effect that the court erred in its conclusions of law on the facts found and that the conclusion of facts found by the court was against the evidence and against the weight of the

evidence. The gist of the decision reversing the case when here before is in the concluding part of it, that it is a question of fact not of law under the evidence in the case whether or not appellant exercised its option and held the plant from month to month by the consent of the respondent, and that that question might be tried under proper instructions, the judgment was reversed and the cause remanded. We think that the declaration of law which we have set out in full and which may be said to be an epitome of the other declarations of law given, correctly states that law as laid down by this court, and is sustained by sufficient evidence in the case to warrant us, as a reviewing court, in saying that there is no reversible error in the case. The determination of the weight of evidence was with the learned trial court; there was conflicting evidence, evidence from which different conclusions might be drawn by the trier, and under such circumstances this court follows his conclusion, finding no errors of law in the declarations given. The judgment of the circuit court is affirmed. All concur.

THOMAS H. POTTS, Respondent, v. ALBERT M. NAHM, Appellant.

St. Louis Court of Appeals. Argued and Submitted March 17, 1910.
Opinion Filed March 22, 1910.

1. JUSTICES' COURTS: Notice of Appeal: Sufficiency. A notice of appeal from a justice of the peace, setting out the venue, the court in which the appeal was pending, the names of the parties, addressed to plaintiff, and giving the name of the justice rendering the judgment, but not giving the amount of the judgment, nor anything by which it could be identified other than the names of the parties, giving a wrong date of the judgment, and, instead of stating that the appeal was to the circuit court, stating that the judgment was rendered in the circuit court, is insufficient.

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2. ———: ———: ———: Amendment After Affirmance: Statute of Jeofails. The Statute of Jeofails, section 660, Revised Statutes 1899, providing that after final judgment, the court, in furtherance of justice and on just terms, may amend in affirmance of the judgment any proceedings in the case, etc., does not authorize an amendment of a notice of appeal, which, without amendment, would not be sufficient as notice, especially after judgment, when its effect would be not to uphold, but to overthrow, the judgment.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

AFFIRMED.

R. L. Shackelford and *J. C. Kiskaddon* for appellant.

(1) A mistake in a notice of appeal from the judgment of a justice of the peace as to the date of the judgment appealed from, will not deprive the appellant of the benefit of his appeal, if it appears that there is enough in the notice to apprise the appellee what judgment was appealed from, or if it is not shown that there is some other judgment, or unless it appears that the appellee has been misled by the notice to his injury. The object is to notify, and if under a fair consideration of the notice it does so, it is sufficient. *Holshen v. Railroad*, 48 Mo. App. 578; *Collier v. Storage Co.*, 128 Mo. App. 113; *Taff v. Insurance Co.*, 127 Mo. App. 308; *Monroe v. Herrington*, 99 Mo. App. 288; *Igo v. Bradford*, 110 Mo. 670; *Teasdale v. A. F. P. Co.*, 120 Mo. App. 584. (2) The statute provides that in appeals from courts of justices of the peace the trial in the appellate court shall be governed by the practice in said court. R. S., sec. 4080. (3) The code of practice authorizes, or when it is in furtherance of justice and does not affect the substantial rights of the adverse party, requires that permission be given to amend any of the proceedings in a cause, even "process," at any stage of the case, either before or after

judgment. R. S., secs. 657, 659, 660, 672, 673. (4) It has been invariably held that obvious clerical errors may be amended at any stage of the proceedings in a case. *Hackett v. Van Frank*, 119 Mo. App. 648; *Metz v. Wright*, 116 Mo. App. 631; *Elliott v. Buffington*, 149 Mo. 663; *Water Co. v. Dreyfus*, 104 Mo. App. 434; *State v. Baird*, 108 Mo. App. 163; *Jarbee v. Hillman*, 19 Mo. 141; *Jump v. McClurg*, 35 Mo. 193; *Jones v. Cox*, 7 Mo. 173; *Moss v. Thompson*, 17 Mo. 405. (5) Even in cases where the clerical error is in the process, and is such that the court would not have jurisdiction of the case, unless the process is amended, yet, if it appears that the adverse party could not, and, as in the case at bar, was not misled, and if it does not appear that he has suffered injury by the error, the court will allow the amendment to be made, thereby acquiring jurisdiction which it otherwise would not have had. *Jones v. Cox*, 7 Mo. 173; *Moss v. Thompson*, 17 Mo. 405; *Jarbee v. Hillman*, 19 Mo. 141; *Jump v. McClurg*, 35 Mo. 193; *Stoner v. Insurance Co.*, 78 Mo. 655; *Whitehill v. Keen*, 79 Mo. App. 125; *State v. Schnettler*, 181 Mo. 173; *State ex rel. v. Francis*, 95 Mo. 44; *Matthews v. Blossom*, 15 Me. 400; *Ordway v. Wilbur*, 16 Me. 263; *Judson v. Adams*, 8 Cush. (Mass.) 556; *Leetch v. Insurance Co.*, 4 Daly (N. Y.) 518; *State v. Bryant*, 5 Ind. 192; *Pollock v. Hunt*, 2 Cal. 193; *Culver v. Whipple*, 2 Greene (Iowa) 365; *Jones v. Miller*, 1 Swan (Tenn.) 319; *Burton v. Insurance Co.*, 26 Ohio St. 467; *Gibbon v. Freel*, 93 N. Y. 93; *Allen v. Allen*, 14 How. Pr. (N. Y.) 248; *Richmond v. Bendson*, 86 Geo. 156; *Covington v. Cathrous*, 35 Geo. 156; *McNiffe v. Wheelock*, 1 Gray (Mass.) 600; *Jackson v. McLean*, 90 N. C. 64; *Currier v. Bartlett*, 122 Mass. 133; *Bradbury v. Van Nostrand*, 45 Barb. (N. Y.) 194; *Ald. on Jud. Writs*, 130, *et seq.*

Peers & Peers for respondent.

(1) A party appealing from a judgment of a justice of the peace shall serve a notice in writing stating the fact that an appeal has been taken from the judgment therein specified. R. S. 1899, sec. 4074. (2) To specify means to point out; to particularize; to designate by words, one thing for another. 26 Am. and Eng. Ency. Law (2 Ed.), page 136. (3) Appellant having specified a judgment in his notice he is bound by that notice, and if it is defective or inaccurate in a vital point, the notice must be disregarded, and treated as no notice at all. The notice of appeal is a thing apart from the actual notice which a party may have, that an appeal has been taken, and great particularity is required in such a notice. Wade on Notices, sec. 1211; Drug Co. v. Hill, 61 Mo. App. 680; Walker v. Carrew, 56 Mo. App. 320; Jordan v. Bowman, 28 Mo. App. 608; Hammond v. Kroff, 36 Mo. App. 118; Cooper v. N. Accident Co., 117 Mo. App. 423; Clay v. Turner, 135 Mo. App. 596.

REYNOLDS, P. J.—On December 14, 1908, plaintiff recovered judgment by default before John T. Sanders, Esq., a justice of the peace of the Ninth District of the city of St. Louis, on an account in the sum of \$500. Defendant was a non-resident of the city of St. Louis, residing in St. Louis county, and under section 4060, R. S. 1899, he was allowed twenty days in which to take an appeal. On the 2nd of January, 1909, he filed his affidavit and bond, the latter being approved, and the appeal granted to the circuit court of the city of St. Louis. On the 20th of January, 1909, the following notice of appeal was served on plaintiff by the sheriff of the city of St. Louis:

“State of Missouri, City of St. Louis, ss.

“In the Circuit Court, February term, 1909.

“Thomas H. Potts, plaintiff, v. Albert M. Nahm, Defendant.

"To Thos. H. Potts:

"You are hereby given notice that the deft. in the above entitled cause has taken an appeal from the judgment of John T. Sanders, Justice of the Peace of, for and in the Ninth District of the City of St. Louis, in said County and State, from the judgment rendered against said deft. on the 14th day of January, 1908, in the Circuit Court of St. Louis City, Missouri.

"Albert M. Nahm,

"By J. C. KISKADDON, his attorney."

This notice, with the return of the sheriff, was filed in the office of the clerk of the circuit court January 28, 1909. Afterwards, on April 6th and at the April term of the circuit court of the city of St. Louis, which was the second term after the rendition of the judgment, the plaintiff moved the court to affirm the judgment of the justice on the ground that the appeal was not allowed on the same day on which the judgment was rendered and that no notice of appeal had been served on the plaintiff or any agent or attorney of the plaintiff as is required by law. The court, on May 7th, sustained the motion to affirm the judgment of the justice and rendered judgment in favor of plaintiff and against his sureties on the appeal bond. The defendant at the time excepted to the action of the court in sustaining the motion and in affirming the judgment and at the same time orally asked the court to permit him to amend the notice by striking out of the body of it the word "January" and inserting in lieu thereof the word "December." The court suggested that the defendant make a motion in writing, whereupon the defendant, on May 10th and during the same term, filed his motion to set aside the judgment of affirmance and reinstate the case and permit defendant to make the amendments aforesaid. The grounds set out in this motion are that it appears from the notice itself that the word "January," in the body of the notice, is a mere clerical error, January being written in place of

December; that it appears that the notice "with the obvious clerical error aforesaid is sufficient to inform plaintiff from what judgment an appeal had been taken;" that it appears that the notice was served upon plaintiff and there is nothing to show that he was misled, deceived or injured by the error in the notice. The court overruled this motion, defendant excepting, defendant afterwards filing his bill of exceptions and perfecting his appeal to this court.

Section 4075, Revised Statutes 1899, provides that if the appellant fails to give the notice of the appeal when the notice is required, the cause shall, at the option of the appellee, be tried at the first term, if he shall enter his appearance on or before the second day thereof or at his instance it shall be continued as a matter of course until the succeeding term at the costs of the appellant, "but no appeal shall be dismissed for the want of such notice." Section 4076 provides that if the appellant fails to give the notice at least ten days before the second term of the appellate court after the appeal is taken, the judgment shall be affirmed or the appeal dismissed at the option of the appellee. There is no entry in the record before us of any transaction at the February term of the circuit court, the only entry prior to the April term being that on January 28, 1909, notice of appeal was filed.

In the case of *Clay v. Turner*, 135 Mo. App. 596, 116 S. W. 480, this court held that a notice of appeal was fatally defective in which the date of the rendition of the judgment was stated to have been August 12th, when in point of fact the judgment was rendered August 7th. The learned counsel for appellant in the case now before us, urges that this decision is erroneous and that the attention of this court was not called to the case of *Holschen Coal Co. v. Mo. Pac. Ry. Co.*, 48 Mo. App. 578, and *Collier v. Langan & Taylor Storage & Moving Co.*, 128 Mo. App. 113, 106 S. W. 593, claiming that if the attention of this court had been called to

those cases the decision in the Clay case would have been different. It is true that there is nothing appearing in the opinion in the Clay case to show that these last two mentioned cases were before the court. The Clay decision, however, is founded upon the decisions in the cases of Hammond v. Kroff, 36 Mo. App. 118, and Cooper v. Northern Acc. Co., 117 Mo. App. 423, 93 S. W. 871, this court stating that the principle of the decisions in these cases is that as the statute (section 4074, R. S. 1899) "requires the notice to state that an appeal has been taken from a judgment 'therein specified,' to mention a judgment of another date other than the true one is misleading." It is further said by this court, Judge Goode delivering the opinion (l. c. 597), that late cases have somewhat relaxed the stringency of the requirements in notices of appeals from justices of the peace, but that he knows of no precedent which overrules or is inconsistent with the decisions cited *supra* upon the point in controversy.

Referring to the Holschen Coal Company case, it will be noticed that this court, in an opinion by Judge Biggs, referring to several cases in which the sufficiency of the notice of appeal had been considered, and referring to Hammond v. Kroff, *supra*, as holding that the notice of appeal was insufficient "because it described the judgment as of date June 21, 1887, whereas the judgment from which the appeal was taken was rendered on June 4, 1887," refers to this variance in date as actually misdescribing the judgment; certainly nothing is said in the decision that lends color to the claim that the mistake in dates is merely clerical or of no importance. In the Collier case, Judge Goode specifically calls attention to the fact that the judgment was referred to in the notice as having been rendered July 26th instead of August 26th. Referring to that he says that the point would be well taken if the notice was not otherwise sufficient to apprise the plaintiff, beyond possibility of doubt, in what cause the appeal had been

taken and to what court. He calls attention to the fact that the title of the case is correctly stated, the justice of the peace before whom it had pended and who had given the judgment and the amount of the judgment and that the cause was then pending in room No. 2 in the circuit court of the city of St. Louis and was known as Case No. 43202a of said court, were all in the notice and that the only error in the notice was the misstatement of the date of the judgment.

Examining the notice in the case at bar, we are compelled to say that it is fatally lacking in the elements which this court, in the Collier case, pointed out as present in the notice then before them, as saving that notice. The notice in the case at bar sets out the venue and that the court in which the appeal is pending is the circuit court of the city of St. Louis, February term, 1909; it gives the name of the plaintiff and of the defendant and is addressed to the plaintiff, and it gives the name of the justice who rendered the judgment, but it does not give the amount of the judgment nor anything by which it can be identified other than by the names of the parties and, as noticed, the date of the judgment is given as the 14th day of January, 1908, and instead of stating that the appeal is to the circuit court of the city of St. Louis it has the very inaccurate statement that the defendant "in the above entitled cause has taken an appeal from the judgment of the justice," naming him, "from the judgment rendered against said deft. on the 14th day of January, 1908, in the circuit court of St. Louis City, Missouri." On all the authorities in which the matter of sufficiency of notice has been discussed, we are compelled to hold and do hold that this notice is insufficient and is no such notice as required by the statute.

Appeal is made to the Statute of Jeofails, Revised Statute 1899, section 660. It has been held that this section is remedial and is to be given a liberal construction. But it has been held not to authorize an amend-

ment to a petition after judgment so as thereby to set out a new cause of action. [Barnes v. Prewitt, 28 Mo. App. 163.] And it is also held that amendments to judgments are to be made, not in derogation, but in support of the judgment. [Stewart v. Stringer, 45 Mo. 113.] Amendments to returns are not only authorized by statute but are frequently sustained by decisions of the courts,—as see Phillips et al. v. Evans et al., 64 Mo. 1, l. c. 23. So are amendments allowed to correct mistakes in names of parties “or a mistake in any other respect, or by rectifying defects or imperfections in matters of form, and such judgment shall not be reversed or annulled therefor.”

It does not seem to us that broad as is this section of the statute and as liberally as it has been construed, it authorizes an amendment of a paper in a cause so as to make that a notice which without amendment is no notice. Moreover, the offer to amend came after judgment and its effect, if granted, would have been not to uphold but overturn the judgment.

The judgment of the circuit court is affirmed. All concur.

ALEX PANOS, Respondent, v. AMERICAN CAR & FOUNDRY COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted March 8, 1910.
Opinion Filed March 22, 1910.

1. **MASTER AND SERVANT: Negligence: Injury to Servant: Case for Jury.** In an action by a servant, who was injured by a heavy iron slab falling on him, as a result of the cogs in a pulley being “eaten off,” allowing a chain, which passed over it and which suspended the slab, to slip, it being shown that knowledge of the defect had been conveyed to the master and that the defect had existed for such a length of time also that the master ought to have known of it, the court did not err in sending the case to the jury.

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2. **DAMAGES: Personal Injuries: Awarding Damages: Function of Jury.** The jury, in a personal injury action, must determine the extent, duration, and probable pain and suffering directly resulting from the injury and the compensation to be awarded therefor, subject to the control of the court to keep the amount within reasonable bounds and to see that it is not the result of passion and prejudice.
3. ———: ———: ———: **Presumption of Ability to Work: Evidence.** Where, in an action for injuries to a servant, the evidence showed that down to the time of the accident he had been earning from \$1.50 to \$2.00 per day, the jury, notwithstanding the absence of evidence of the servant's previous physical condition, could presume that his condition enabled him to do the work and earn the wages he was receiving when hurt.
4. ———: ———: ———: **Instructions: Loss of Time: No Evidence of Inability to Work.** In an action for personal injuries, where there was no evidence that since the accident plaintiff had not been able to earn any wages, but only that he had earned nothing, an instruction directing the jury to take into consideration the loss of his time in estimating his damages was erroneous.
5. ———: ———: ———: ———: ———: ———: **Harmless Error.** The error of said instruction was harmless, however, in view of the fact that the verdict was for \$750 only, which was very moderate, and in view of the fact that the injured foot was exhibited to the jury and that they could assume, from the fact a heavy iron beam fell upon and crushed it, plaintiff had suffered great pain.

Appeal from St. Louis City Circuit Court.—*Hon. Virgil Rule*, Judge.

AFFIRMED.

Watts, Williams & Dines and *Wm. R. Gentry* for appellant.

(1) The demurrer to the evidence should have been sustained: (a) Because there is no evidence in the record to show that any defective condition in the cogs of the wheel referred to in the evidence was the proximate cause of the accident to plaintiff. (b) Be-

cause there was no evidence of any notice either actual or constructive to the defendant concerning a defective condition of the cogs on the wheel referred to in the petition. It is elementary that there must be either actual or constructive notice to the master concerning a defective appliance before he is liable for injuries resulting to the servant on account of the same. The rule is the same whether the thing complained of is the place to work or an appliance with which to work. *Bee-bee v. St. Louis Transit Co.*, 206 Mo. 419; *Brooks v. Railroad*, 71 S. W. 507; *Wojtylak v. Coal Co.*, 188 Mo. 260. (c) Because there is no evidence in the record that plaintiff sustained any injury as the result of the falling of the slab or sill of iron. (2) The court erred in giving the instruction given by the court at the request of the plaintiff, relating to the measure of damages. This instruction is wrong because it embraces elements not supported by the evidence, such as previous and present physical condition, loss of time, pain and suffering, future loss of earnings and future damages without specifying what damages. Instructions on the measure of damages should embrace no elements not supported by the testimony. *Moellman v. Lumber Co.*, 114 S. W. 1023; *Morris v. Railroad*, 144 Mo. 500; *Slaughter v. Railroad*, 116 Mo. 269; *Coontz v. Railroad*, 115 Mo. 669; *Gibler v. Railroad*, 203 Mo. 208; *Railroad v. Flood*, 70 S. W. (Tex.) 331.

Stein & Wulff, for respondent, filed argument.

REYNOLDS, P. J.—Action for damages for personal injuries sustained while plaintiff was in the employ of the defendant. It is averred in the amended petition upon which the case was tried, that plaintiff was at work on a certain iron slab or plate, inserting bolts or spikes into it, for the purpose of having them riveted, the slab being held above the ground by a pulley, operated by the extension of an iron chain over a

cogwheel, the pulley and chain being designed and used for the purpose of lifting the slabs from the ground and holding them while the workmen were engaged in punching, riveting and spiking thereon; that while plaintiff was at work on this iron slab it slipped and fell and struck the left foot of plaintiff, crushing and mashing it in such manner as to necessitate the amputation of his foot at a place about two inches below the ankle; that the cause of the slipping and falling of the plate was the defective cogwheel over which the chain passed and that the direct cause of plaintiff's injury was the negligence of defendant in furnishing him unsafe appliances with which to work. Damages were prayed in the sum of \$1999 and costs.

The answer was a general denial.

At the trial of the case before the court and jury, there was evidence tending to establish the facts set out in the petition.

Plaintiff is a Greek, entirely unacquainted with the English language, and his fellow-workmen were Greeks or Bulgarians, and the testimony was all given to the court and jury by means of interpreters, so that it is rather difficult to arrive at the exact facts in evidence. Beyond the fact that the plaintiff was injured in the foot by the falling of this iron beam upon it while he was at work, there is nothing in the record to show what the injury consisted of, as the plaintiff and the interpreter do not appear to have been able to describe it in words, but it does appear that during the progress of the trial, plaintiff took off his shoe and sock and exhibited the injured foot to the jury. It was further in evidence that before the injury plaintiff was earning from \$1.50 to \$2 a day and that he had not worked since down to the time of the trial. There was some evidence in the case tending to show actual knowledge or such continuance of the condition as to constructively charge defendant with knowledge of the

defective condition of the cogs on the wheel or pulley, over which the chain used in raising and lowering the iron slab passed and there was evidence tending to show that by reason of the defective condition of these cogs, they being half worn, the chain had slipped in passing over this cogwheel, and that the slipping of this chain on the cogwheel of the pulley had resulted in letting the slab fall on plaintiff's foot, thereby injuring it. There was no evidence in the case as to what the previous condition of the plaintiff was, as to physical strength or health.

At the close of the testimony defendant asked a peremptory instruction in the nature of a demurrer which the court refused, defendant excepting. Of its own motion the court gave an instruction to the effect that if the jury found that plaintiff was in the employ of the defendant as a laborer at its car shops in the city of Madison, Illinois, where the injury occurred, and that on the day of the alleged injury it was a part of his duty to use a certain pulley operated by a certain iron link chain, running over a cogwheel, and if they found that that was the appliance furnished to him by his employer and used in the work in which he was engaged, and that the iron slab described in the evidence fell upon and injured plaintiff, and if they believed that the slab was caused to fall by reason of the fact that the cogs on the cogwheel over which the iron link chain passed, were worn in such a manner as to cause the chain to slip and fail to catch in the links as the chain passed over the cogwheel, and if they found that the defective condition of the wheel was known or by the exercise of ordinary care might have been known to the defendant, and that at the time plaintiff was in the exercise of ordinary care for his own safety, they should find for plaintiff, the court further instructing the jury that it was the duty of the master to use ordinary care to furnish his servants a reasonably safe place to work and furnish him with rea-

sonably safe machinery and appliances with which to do the work allotted to him. The court also defined ordinary care and the number of jurors necessary to find a verdict, and at the instance of the plaintiff instructed the jury that if they found for him, in estimating his damages the jury would consider his physical condition before and since receiving the injuries for which he sues, as shown by the evidence, the physical pain and mental anguish, if any, suffered by him on account thereof at the time of and since his injuries, his loss of time and such damage, if any, as the jury might, from the evidence, find it reasonably certain he would suffer in the future therefrom, and that the jury would find a verdict, if they found for plaintiff, for such sum as in their judgment will, under the evidence, reasonably compensate him for such injuries, not exceeding the sum of \$1999. These were excepted to by defendant. At the request of the defendant the court instructed the jury, in substance, that if they found from the evidence that the iron wheel referred to in the evidence was carried and placed by a crane so that one end rested upon the ground and one end upon the machine, that a hook was fastened to it by some of the members of the same gang in which plaintiff worked and some of the others in the gang began to pull upon the chain and in doing so caused the wheel to be turned upon its edge and that by reason thereof it was caused to slip from the machine and so fell upon plaintiff and injured him, then plaintiff is not entitled to recover.

There was a verdict in favor of plaintiff in the sum of \$750, the verdict being signed by nine of the jurors. After a motion for new trial defendant duly appealed to this court.

The assignments of error are that the court erred in overruling defendant's demurrer to the evidence and that it erred in giving an improper instruction on the measure of damages at the request of plaintiff.

We have read all the evidence in the case as pre-

sented in the abstract furnished by the appellant and cannot agree to the first assignment of error. There was evidence in the case entitling the plaintiff to go to the jury. It is true the evidence is meager, evidently the result of unskilled interpreters, the witnesses for the plaintiff and plaintiff himself being totally unacquainted with the English language, and being questioned by and their answers all coming through interpreters, but in spite of this fact, there was evidence before the jury that the plaintiff had been injured by the falling upon his foot of the iron slab or plate upon which, at the time, he, with others, was engaged in working. While they were handling this large slab, which appears to have been some 30 feet long and 2 feet or more wide, a heavy iron slab, the chain which passed over a wheel in the pulley slipped by reason of the cogs in it being "eaten off," as the witnesses described it, about one-half. There was evidence, slight, it is true, tending to show that a knowledge of the defective and unsafe condition of this cogwheel had been conveyed to the employer and there was substantial evidence to show that its defective condition could have been discovered and was known to those working around it long enough to warrant the court in instructing the jury on the law of constructive notice, and warranting the jury in finding that the master, the employer, ought to have known of its defective condition. So that there is no ground for exception to the action of the trial court in overruling the demurrer, or in giving the main instruction as to plaintiff's right to recover.

The objection to the instruction as to the measure of damages is more serious. As before noted, the jury had before them ocular demonstration of the extent of the injury, they were the triers of fact as to the extent, duration and probable pain and suffering which would directly result from such an injury, and the compensation he should receive therefor, subject, of

course, to the control of the court to keep that amount within reasonable bounds, and to see that it was not the result of passion and prejudice. Furthermore, the jury had a right to assume that if the plaintiff was in such physical condition when employed by the defendant as to justify his employment, that his physical condition down to the time of the accident was certainly sufficient to enable him to do that work and earn the wages he was receiving. It was in evidence that before the accident and down to the time of it he had been earning from \$1.50 to \$2 a day wages. There was no evidence that since the accident the plaintiff had not been able to earn the same or any wages, only that he had earned nothing, therefore, the instruction directing the jury to take into consideration the loss of his time in estimating plaintiff's damage was erroneous. With all the facts before them, however, as we have before noted, there was sufficient evidence to warrant the jury in finding for the plaintiff. The jury saw the injured foot; they had a right to assume from the very nature of the accident itself, that is to say, a heavy iron beam falling upon and crushing a man's foot, that great pain and suffering would result. Certainly the verdict of \$750 was exceedingly moderate, if the foot was merely crushed and not so injured as to compel amputation, as alleged in the petition. Under the facts we do not think that the error as to compensation for loss of time is reversible error, and it is the only error in the case. Having in mind the injunction of section 865, Revised Statutes 1899, that the appellate court "shall not reverse the judgment of any court, unless it shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action," we are all of opinion that the verdict and judgment in this cause should be affirmed.

The judgment of the circuit court is accordingly affirmed. All concur.

JOHN W. VOGELSONG, Appellant, v. ST. LOUIS
WOOD FIBRE PLASTER COMPANY et al.,
Respondents.

St. Louis Court of Appeals. Argued and Submitted March 15, 1910.
Opinion Filed March 22, 1910.

1. **PLEADING: Code: Bill in Equity.** The old form of a bill in equity is not in use in Missouri, section 592, Revised Statutes 1899, providing that plaintiff's first pleading is the petition, and prescribing what it shall contain.
2. **EQUITY: Pleading: Prayer for General Relief.** Section 592, Revised Statutes 1899, requires the petition to contain a demand for the relief to which plaintiff supposes himself to be entitled, and, if the recovery of money is demanded, to state the amount thereof, or facts which will enable the amount to be ascertained. Section 776 provides that in any other case than default the court may grant plaintiff any relief consistent with the case made by him and embraced within the issues. *Held*, that where the petition in an equity case contained a prayer for general relief, the court might disregard prayers for a discovery and accounting, and award plaintiff any other relief to which the facts alleged in the petition entitled him.
3. ———: ———: **Bill of Discovery: Abolished by Code.** A bill of discovery, as known to ancient chancery practice, is not available since the adoption of the Code; its provisions for taking depositions obviating the necessity of a bill of discovery.
4. ———: ———: **Accounting.** An action for accounting will not lie as a ground for relief in equity, unless founded upon some known and established equitable ground of action.
5. **TRUSTS: Constructive Trusts: Pleading: Sufficiency of Petition.** The petition alleged: That plaintiff was the owner of a patented machine for making wood fiber plaster and leased the right to use one of such machines in a certain territory to Willis, who acted as trustee for the St. Louis Wood Fibre Plaster Company, a corporation thereafter organized, upon certain royalties and other considerations, and that the lessee agreed not to operate the machine outside the territory named, or sublease it to any parties operating outside such territory, and not to use any other machine in such territory, the lease, which was witnessed by certain individual defendants, to be

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vold at plaintiff's option if the lessee violated its terms; that the individual defendants referred to were officers of and had the control of the Acme Cement Plaster Company, a foreign corporation; that the St. Louis Company and the other defendants have only partly performed the contract, in that "it has paid your petitioner" a certain sum as agreed, but "that the said defendants" owned and controlled the Acme Company, and also became the owners and controllers of the St. Louis Company, which was organized by defendants "with a fraudulent intent to injure" plaintiff and with the intention of abandoning that company thereafter; that afterwards another wood paper machine was patented, several of which were purchased by the Acme Company and used, in violation of the lease, when the St. Louis Company was abandoned by the individual defendants above referred to, with the knowledge and consent of Willis and another, and the machine leased to the St. Louis Company by plaintiff was taken by the defendant Acme Company and operated; that the Acme Company and individual defendants were operating machines in towns out of the territory named in the lease; and that large sums have become due plaintiffs thereby. The prayer is that the Acme Company be decreed trustee for the St. Louis Company and, with the other defendants, be required to account to plaintiff for royalties due. No relief was asked against the St. Louis Company, and there was no allegation that the lease was assigned to the Acme Company by the St. Louis Company, nor that the former Company had ceased business, and no specific allegation that the St. Louis Company transferred to it the leased machine. *Held*, that the facts alleged did not establish a constructive trust against the Acme Company or the individual defendants; the mere fact that the same persons were interested in the two companies as stockholders or officers, even if that were alleged, not of itself being sufficient to charge one company with the acts of the other.

6. **CORPORATIONS: Two Corporations Controlled by Same Parties: Liability.** The mere fact that the same parties are in two companies, as stockholders, managers or otherwise, is not in itself sufficient to render one company chargeable with the acts of the other.

Appeal from St. Louis City Circuit Court.—*Hon. Jas. E. Withrow*, Judge.

AFFIRMED.

Gardner, Morgan & Wood for appellant.

(1) Wherever one person is placed in such a relationship to another, by the act or consent of the other, or by the act of a third person or the law, that he becomes interested for him or interested with him in any subject of property or business, he is prohibited from acquiring rights antagonistic to the persons with whose interests he has become associated. *Barrie v. Railroad*, 138 Mo. App. 557; *American Notes to Keech v. Sandford*, 1 White & Tud. Cas. in Equity, 4 Am. Ed., p. 62, *58; *Trice v. Comstock*, 121 Fed. Rep. 620 and cases cited; *Barthold v. Land & L. Co.*, 91 Mo. App. 233; *Thompson v. Abbott*, 61 Mo. 176; *Huyker v. School Dist.*, 72 Mo. 643; *Flaves v. Bank*, 79 Mo. 182. (2) To make available the equitable remedies in favor of a creditor of a defunct corporation, it is sufficient that it had done or suffered acts which destroyed the end and object for which it was created. *Slee v. Bloom*, 19 Johns (N. Y.) 456; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387; 3 *Thomp. on Cor.*, sec. 3345; *Barthold v. Land & L. Co.*, 91 Mo. App. 233; *Barrie v. Railroad*, *supra*. (3) Everything is presumed against the wrongdoer. *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 Johns Ch. (N. Y.) 62; *Railroad v. Richards*, 40 Ill. App. 560, 30 L. R. A. 33; *Richmond v. D. D. S. C.*, etc., 40 Ia. 264; *Amory v. Delamirie*, 1 Smith's L. C., part 1, p. 679; 2 *Hughes on Procedure*, p. 1172.

W. E. Fisse for respondents.

STATEMENT.—This is a suit in equity, commenced in the circuit court of the city of St. Louis, by plaintiff against the St. Louis Wood Fibre Plaster Company, the Acme Cement Plaster Company, Samuel Lazarus, S. A. Walker, Jas. R. Dougan, Gordon Willis and F. P. Hunkins. The second amended petition in the cause avers that the plaintiff was the owner of a patented

device called the Vogel song Wood Fibre Machine, a device intended for reduction of wood to fibre, which was to be used in making wood fibre cement plaster, it being averred that this was the first machine invented for reducing wood to fibre and was the only one on the market; that in order to secure the means of making wood fibre cement plaster, the defendant Willis, as trustee of the St. Louis Wood Fibre Plaster Company, but which company was not at that time organized as a corporation, on the 2d of December, 1901, entered into a contract with the plaintiff, called therein "lessor," Willis being designated as "lessee," whereby the lessor, in consideration of the rental to be paid as thereafter set out and in consideration of the faithful performance by the lessee, or his assigns, of each and every one of the agreements mentioned, leases unto the lessee or his assigns, "one Vogel song wood fibre machine," manufactured under patents owned and controlled by plaintiff, the lessor agreeing to grant to the lessee or his assigns, the right to use the machine in certain designated territory during the life of the letters patent to be issued on the machine, the lessor agreeing not to sell, rent, lease, or in any manner permit the use of the machine in the territory described other than to the lessee or his assigns, to furnish the lessee or his assigns an additional machine or machines when the manufacturing business of the lessee requires, and various other agreements not now necessary to note. The lessee on his part agreed to accept the conditions of the contract; to pay the lessor a royalty of twenty-five cents per neat ton for the first two thousand tons of plaster or other mixtures manufactured or produced from or by each and every machine, and twelve and one-half cents per neat ton for all quantities produced thereafter; to pay the lessor upon receipt of the railroad company's bill of lading of said machine, consigned to St. Louis or such other point as may be designated by the lessee, the sum of five hundred dol-

lars, for which the lessee is to receive credit as advance payment on the royalty to be paid as in the lease provided, keeping the machine in good repair and returning it to the lessor at the expiration of the lease in good condition; if the product of the machine is marketed as a commodity, then the lessee is to pay the lessor a royalty of fifteen cents per hundred pounds of wood fibre thus sold; not to operate the machine outside of the territory before mentioned or to sub-lease the machine to any parties operating outside of the territory; to diligently push the business in all the territory mentioned in every reasonable and consistent manner and to lease additional machines from said lessor or his assigns as fast as the business requires, it being mutually agreed between the parties "that in consideration of the terms of this contract . . . said lessee shall not use or operate, during the life of this contract, any other machine or machines within said territory, for the reduction of wood fibre, save and except the Vogelsong wood fibre machine." It was further agreed that "a failure upon the part of said lessee to comply with the terms of the contract shall void the same at the option of the lessor, and authorize said lessor to enter upon the premises and remove the machine therefrom, and to recover from said lessee any payment then due under this contract," the lessor to be allowed to lease or operate the machines within the territory designated if the lessee neglect to occupy it, and that the lessee was to employ the lessor for a period of three months from the date of the contract at \$150 per month and reasonable expenses, it being stipulated that the terms of the contract of the lease should extend and become binding upon the executors, administrators, legal representatives and assigns of the lessor and upon the successors or assigns of the lessee. This contract of lease or license was signed by the plaintiff and by Gordon Willis, trustee for the St. Louis Wood Fibre Plaster Company, and witnessed

by the defendants Lazarus, Walker and Hunkins. It is further averred in this petition that the St. Louis Wood Fibre Plaster Company was afterwards organized and began to make wood fibre cement plaster in pursuance of the terms of the agreement, and that the defendants Lazarus, Walker and Dougan had at all times the controlling interest in the capital stock of the Acme Cement Plaster Company, a corporation organized under the laws of the State of Illinois; that they still hold said interest; that Lazarus is president, Walker vice-president and Dougan secretary and treasurer, and it is stated on information and belief that Hunkins and Walker are stockholders in the Acme Cement Plaster Company and its selling agents, and that the same is operated and directed by Lazarus, Walker and Dougan. Averring performance of his part of the contract, plaintiff, describing himself in the petition as the petitioner, says the St. Louis Wood Fibre Plaster Company and the other defendants have carried out the contract only in part, in that "it has paid your petitioner the sum of \$500, as provided, for advance payments on royalties upon receipt of the bill of lading of the machine;" afterwards made a payment of \$500 on royalties; carried out the contract of hire for the personal services of plaintiff, and continued operations under the contract for about two years. It is then averred "that the said defendants" (not saying who of the defendants) owned and controlled, as aforesaid, the Acme Cement Plaster Company, and also became the owners and controllers of the St. Louis Wood Fibre Plaster Company; that the latter company was merely organized on the part of the defendants "with the fraudulent intent to injure this defendant" (undoubtedly meaning plaintiff), and it was designed by the defendants when said agreement was made, that when it should suit the purposes and interests of the Acme Cement Plaster Company and the defendants

above mentioned, the St. Louis Wood Fibre Plaster Company was to be abandoned by them.

It is further averred that about two years after entering upon the performance of the contract, another wood fibre machine was patented and put on the market, and several of them purchased by the Acme Cement Plaster Company and used by it in making cement plaster, and that about the same time the St. Louis Wood Fibre Plaster Company was abandoned by the defendants Lazarus, Walker and Dougan with the knowledge and consent "of said defendants Gordon and Willis (sic), and the machine which had been operated by the St. Louis Wood Fibre Plaster Company was taken by the defendant, the Acme Cement Plaster Company, and ever since has been used in the manufacturing operations of said defendant, the Acme Cement Plaster Company, and said machines have been in use ever since so taken by said Acme Cement Plaster Company as aforesaid." This use of another machine, it is charged, is in violation of the agreement between plaintiff and Willis, that the lessee Willis should not use or operate during the life of the contract, any other machine or machines within the territory designated, for the reduction of wood to fibre, save and except the Vogelsong machine, and it is particularly charged upon information and belief that the Acme Cement Plaster Company is operating wood fibre machines about which the agreement was made, in two towns in Texas and other places in the United States to plaintiff unknown. Reciting the obligation to pay the royalties and the agreement for the adjustment of them, as set out in the lease, and that accurate records were to be kept of the product and that by that contract the St. Louis Wood Fibre Plaster Company was prohibited from operating the Vogelsong machine outside the territory heretofore designated or to sublease the machine to any other parties operating outside of the territory, it is stated on information and

belief that the Acme Cement Plaster Company and the defendants Lazarus, Walker and Dougan are operating said wood fibre machines (meaning the Vogelsong machines) contrary to the terms of the contract in various outside places named and in other outside places to plaintiff unknown; that because of the operations of the defendants and "because of the premises herein," large sums of money have become due and owing plaintiff and although plaintiff has often and repeatedly requested an accounting of the St. Louis Wood Fibre Plaster Company, as by the terms of the contract made and provided, and of the Acme Cement Plaster Company and of the other defendants named, no accounting has been rendered and the defendants and each of them have wholly failed and still refuse to make the same or render any reports or quarterly statements which by the terms of the contract defendants were obliged to render to plaintiff. This second amended petition concludes as follows:

"Forasmuch, therefore, as your petitioner can have no adequate relief save in a court of equity, and to the end, therefore, that the defendants may, if they can, show why your petitioner should not have the relief hereby prayed, and that they may make full disclosure and discovery of all the matter aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being expressly waived; and that the Acme Cement Plaster Company may be held as trustee for the St. Louis Wood Fibre Plaster Company, and that the Acme Cement Plaster Company and the other defendants hereinabove named may be decreed to account for and pay over the royalties or income, not only on the Vogelsong Wood Fibre Machine, but any other machines which they may have been operating, and which they are unlawfully withholding to the same ex-

tent, and as fully as though the St. Louis Wood Fibre Plaster Company was operating said machines under and by virtue of said contract hereinbefore set forth, and that they may be required to pay the costs of this suit, and other and further relief as to equity may seem meet in the premises and required by good conscience."

The defendants demurred, filing separate demurrers, on the ground that this petition did not state facts sufficient to constitute a cause of action. The demurrers were sustained and plaintiff declining to plead further, final judgment was entered against plaintiff and discharging the defendants. From this plaintiff has duly perfected an appeal to this court.

REYNOLDS, P. J. (after stating the facts).—The petition is addressed "To the Honorable Judge of the Circuit Court, City of St. Louis, State of Missouri, in Chancery sitting." We have long since abandoned in this State the old form of a bill in equity. Our statute (Revised Statutes 1899, sec. 592) providing that the first pleading on the part of the plaintiff is the petition, prescribes what it shall contain, the third requisite being that it shall contain "a demand of the relief to which the plaintiff may suppose himself entitled. If the recovery of money be demanded, the amount thereof shall be stated, or such facts as will enable the defendant and the court to ascertain the amount demanded." Construing this latter clause, our courts have often held that when in a suit of equity, there is a general prayer for relief, as there is in this case, such relief will be granted as the facts set out will warrant. It was long ago decided that since the adoption of our Code, the bill of discovery, as known to the ancient chancery practice, no longer prevailed in this State, our courts holding that the statutory provisions for taking depositions have done away with the necessity of the old bill of discovery and that

while the deposition was not a substitute for the bill of discovery, all that could be accomplished by means of a bill of discovery could now be accomplished by means of depositions. See *Eck v. Hatcher*, 58 Mo. 235, l. c. 239; *Larimore v. Bobb*, 114 Mo. 446, l. c. 453, 21 S. W. 922; *Tyson v. Farm & Home Savings & Loan Assn.*, 156 Mo. 588, l. c. 594, 57 S. W. 740; *Strode v. Frommeyer*, 115 Mo. App. 220, l. c. 223, 91 S. W. 167. Nor will a bill or action for an accounting lie as a ground for relief in equity, unless founded upon some known and established equitable ground of action. As illustrating this, see *Pope v. Salsman*, 35 Mo. 362. While our statute (R. S. 1899, sec. 776) provides, in case of default, for instance, that the damages or other relief shall not be other or greater than that which shall have been demanded in the petition, the same section provides, "but in any other case, the court may grant him any relief consistent with the case made by the plaintiff and embraced within the issues." This view has been held by the Supreme Court as having no application where the final judgment for defendant has been reached on demurrer. "In that event," says the court, "the prayer for general relief, supplemental to one for specific performance, cannot, in view of section 2039 (Revised Statutes 1889), be construed as a prayer for money judgment." [*Rush v. Brown*, 101 Mo. 586, l. c. 592, 14 S. W. 735.] Section 2039, Revised Statutes 1889, is now section 592, Revised Statutes 1899. That is to say, if sufficient facts are stated to entitle the party to relief, that the particular relief he may ask may, if necessary, be disregarded, and the court may grant him the relief to which the facts stated entitle him. So that applying these rules to the case before us, we disregard the prayer for discovery and for an accounting and pass to the consideration of the case on the facts stated in the petition. Without setting out the amended petition in full or the lease or license therein referred to, we think we have given

enough to show what is involved in this case, and briefly, the claim is that plaintiff, owner of a patented machine for making wood fibre plaster, sold or leased the right of the use of it for the term of the patent, to Gordon Willis in certain designated territory, Willis at the time acting for the St. Louis Wood Fibre Plaster Company, thereafter to be organized. That company was organized and Willis and Hunkins and Walker and Lazarus, the three latter being witnesses to the license contract and thereby undoubtedly intended to be charged by plaintiff with knowledge of it, proceeded under the contract for about two years, when they appear to have abandoned it and to have operated under another company organized by them, called the Acme Cement Plaster Company, and that company, using plaintiff's machine and other machines, carried on operations of manufacturing wood fibre cement plaster. This is charged to be contrary to the terms of the contract between plaintiff and Willis. The thought of the pleader seems to be that some sort of constructive trust was imposed on the individual defendants and on the Acme Cement Plaster Company, by reason of the fact that the same parties were in each concern, the charge being that the St. Louis Wood Fibre Plaster Company was organized by the defendants named with the fraudulent intent to injure "defendant" (sic), it being designed by defendants when the agreement was made, possibly meaning the agreement of lease with Willis, although this is not clear, that when it should suit the purposes and interests of the Acme Cement Plaster Company and the individual defendants, the St. Louis Wood Fibre Plaster Company was to be abandoned by them. This is all that may, by any construction, be held to charge fraud. Counsel cite in support of this theory of a constructive trust, various cases from this court, among others, *Bertholdt v. Land & Lumber Co.*, 91 Mo. App. 233, and *Barrie v. United Railways Co.*, 138 Mo.

App. 557, 119 S. W. 1020, also citing and quoting at length from *McCourt v. Singers-Bigger*, 145 Fed. 103. We are unable to see that these cases support plaintiff's contention. There is no averment of any transfer or assignment of the lease from the St. Louis Wood Fibre Plaster Company to the Acme Cement Plaster Company; no averment of privity between the two companies. No averment that the St. Louis Wood Fibre Plaster Company has gone out of business; merely that the defendants have abandoned it. If there was a breach of contract, it was a breach of the contract between him and the St. Louis Wood Fibre Plaster Company, made for that company by its trustee, Gordon Willis, by that company, and whatever remedy plaintiff has or whatever cause of complaint, would seem to be against that company. The mere fact that the same parties were in the two companies as stockholders or managers or otherwise, is not in itself sufficient to render one company chargeable with the acts of the other. We have pointed out the rule which saddles liability where there is identity of the parties in the two cases referred to and cited by plaintiff, that is in the *Bertholdt* and *Barrie* cases. The averments here made do not bring the case within the rule. No relief is asked and no facts stated that call for relief against the St. Louis Wood Fibre Plaster Company. It does not even appear that any of the individual defendants had a controlling interest in the St. Louis Wood Fibre Plaster Company. By his own statement plaintiff is a creditor at large of that company, with no established demand against it, and no adjudication of any demand or its amount, and no statement on which, by an interpretation of the pleading, we can say what that amount should be. It may be that that demand is so far in excess of the jurisdiction of this court that we would be without authority to pass on this case. He shows no right to hold the Acme Cement Plaster Company under the lease; if it

is true that it is using or has used his patented machine without license, he may have his right to an injunction against its further use and for royalties by way of damages. But that is not this action. At all events the facts stated are not sufficient to establish a constructive trust as against the individuals or against the Acme Cement Plaster Company, and as before said no relief whatever is asked against the St. Louis Wood Fibre Plaster Company.

The fraud and conspiracy charged, if any is charged, is that the individual defendants merely organized the St. Louis Wood Fibre Plaster Company with the fraudulent intent to injure the plaintiff—how they were to do so is not stated—and that it was designed by the defendants, when the agreement was made, that when it should suit the purposes and interests of the Acme Cement Plaster Company and the defendants, that the St. Louis Wood Fibre Plaster Company would be abandoned by them. How the abandonment of the St. Louis Wood Fibre Plaster Company by the defendants named was to affect plaintiff is not stated. He had, or at least avers, no contract with these individual defendants, not even a personal one with Willis, to stay in and with the St. Louis Wood Fibre Plaster Company. *Non constat* but that the last named company still flourished even after these defendants abandoned it. It is not even charged that the latter company sold or assigned or transferred the one machine leased—and there is but one charged to have been leased. For all that appears they may have obtained it without the consent of the St. Louis Wood Fibre Plaster Company.

Without going further into a consideration of the case or into a discussion of all the points presented in it by the learned counsel for appellant, we have reached the conclusion that the petition fails to state a case entitling plaintiff to any relief in equity on the facts

stated, and that the action of the circuit court in sustaining the demurrer to it was correct. The judgment is affirmed. All concur.

**ALBERT HAMBERG, Appellant, v. MINNIE
HAMBERG, Respondent.**

St. Louis Court of Appeals. Argued and Submitted March 9, 1910.
Opinion Filed March 22, 1910.

1. **DIVORCE: Public Policy: Function of Courts.** The courts have no concern with the policy of the adoption of the statute providing for the granting of a divorce for desertion without reasonable cause for the space of one year, their function being to administer the law.
2. **APPELLATE PRACTICE: Disregard of Testimony by Trial Judge: Reason Stated of Record.** Where a trial judge places no reliance on a case as made, on account of the manner or conduct of the witnesses or parties, and for that reason disregards the testimony, and so states of record, the appellate court would hardly fail to follow him.
3. **DIVORCE: Desertion: Sufficiency of Evidence.** In a suit for divorce for desertion under section 2921, Revised Statutes 1899, allowing a divorce where either spouse has absented himself or herself without a reasonable cause for the space of one year, evidence held to show desertion within the statute.
4. **———: Decree Goes as Matter of Right, when Evidence is Sufficient.** Where the defendant in a proceeding for divorce by her conduct has furnished cause which the statute declares to be sufficient to entitle plaintiff to a divorce, he has a right, granted by the law, to a decree, he not being in fault.

Appeal from St. Louis City Circuit Court.—*Hon. Moses
N. Sale, Judge.*

REVERSED AND REMANDED (*with directions*).

Charles H. Brock for appellant.

(1) The circuit court erred in dismissing plaintiff's petition, as under the law and the evidence, he is entitled to the relief prayed for in his petition. (2) The defendant, under the circumstances of this case, absented herself from plaintiff without reasonable cause. *Grove v. Grove*, 79 Mo. App. 142; *Freeman v. Freeman*, 94 Mo. App. 504.

REYNOLDS, P. J.—Suit by plaintiff against defendant for divorce on the ground of desertion, suit commenced September 4, 1908. Both parties, it is averred, lived in this State and in the city of St. Louis the statutory period required for residence and for giving jurisdiction to the circuit court of that city. The ground set out is desertion, it being alleged that defendant had absented herself from plaintiff without a reasonable cause for the space of one year. Defendant was personally served but made default. At the final hearing of the cause plaintiff testified that he was a resident of the city of St. Louis; that he and defendant were married in 1898, and began living together in the city of St. Louis immediately after the marriage and had continued to live there together until the 6th of June, 1905, when the defendant left him; that plaintiff had always treated defendant with kindness and consideration, gave her all the money he could spare outside of his own personal expenses; that the allowance to her for her expenses depended upon what he made, if he made \$27 a week he would sometimes give her as high as \$24 out of the \$27; that defendant was engaged in dressmaking business all of the time the parties were married and did not attend to household duties, the household work being performed for a time by a sister of the defendant and a greater part of the time by plaintiff's mother, who lived with plaintiff and defendant and did the household work; that defendant

Hamberg v. Hamberg.

had induced plaintiff's mother to come and live with them for that purpose and that after she came to the house the mother took charge of it; that defendant kept all the money she earned in her dressmaking business herself; had told plaintiff she did not care for him; was tired of him and intended to leave him. She told him a short time prior to leaving that she had seven thousand dollars. Plaintiff testified that he believed that that was correct as the defendant had been receiving money all the time they lived together from the proceeds of her dressmaking business and that this was in addition to what plaintiff had given her; that she made from twenty to thirty dollars a week and saved every cent of it; that after defendant left him in June, 1905, they had never lived together as husband and wife. About three weeks after defendant left plaintiff, she met him and wanted him to give her five dollars a week. Plaintiff told her then that the only way he would give her any money was for her to come and live with him; that he could not be expected to support her while she still lived away from him. Defendant told him that she would not do that; that she did not care for him and said to him, "I have had you for a sucker and for what I wanted." Three witnesses testified to the good character of plaintiff and that they had known plaintiff and defendant while they lived together; that plaintiff's conduct to the defendant had always been kind; had never seen or heard of quarrels between them or of any mistreatment on the part of plaintiff. Plaintiff's mother testified that the defendant "did not treat plaintiff right;" that she had never heard defendant make any complaint about the treatment she had received. She was living at the home of the parties when defendant left and took up her residence with a sister. Defendant told this witness that she was going to live with her sister and told her before the World's Fair that she had seven thousand dol-

lars. There were no children born of the marriage. This was practically all of the evidence for plaintiff.

At the instance of the court defendant was brought into court on subpoena. She testified that she had left plaintiff on the 6th of June, 1904 or 1905. In answer to a question by the court, she stated that she left plaintiff because she did not want to live with him any longer; didn't care for him any more; had grown tired of him, "he was not just exactly as he ought to have been;" grew tired of him because she did not think he gave her sufficient support; gave her ten or fifteen dollars a month. Was employed in the hat business; also kept a rooming house sometimes; supposed plaintiff earned more money than he said he did, although she never knew exactly what he earned. Plaintiff had not always given her fifteen dollars a month and never gave her more than that from 1898 until 1905, when she left. Her reason for leaving plaintiff, she repeated, was that she grew tired of him; she did not care for him any more and had no affection for him. There was no one else that she had any affection for, but she thought that if plaintiff had given her sufficient support she would be living with him yet. In answer to a question of the court as to whether she would care to go back and live with plaintiff, she answered, "Well, at that time I left, I do not think he cared for me." On cross-examination she testified that plaintiff had never abused her personally. This was substantially all the testimony in the case. At the conclusion of the trial the court entered a decree dismissing the bill. Plaintiff in due time filed a motion for new trial which was overruled, exception saved and appeal duly perfected to this court.

The statute governing divorce (section 2921, R. S. 1899) specifically allows a divorce in cases where either party to the marriage "has absented himself or herself without a reasonable cause for the space of one year." With the policy of adopting such a statute and consti-

tuting absence, or to use the common expression, desertion, without a reasonable cause for the space of one year, a cause for divorce, the courts have no concern. All we can do is to administer the law. When it is proven beyond controversy, as it was in this case, that the facts authorizing the decree exist, the injured party has a right, under the statute, to the decree. Reluctant as the appellate courts are to interfere with the conclusion of the trial judge on the facts, when a case is presented to us which clearly meets the requirements of the statute, we are not at liberty to shelter ourselves behind the conclusion arrived at by the learned trial judge and follow his finding on the facts. The evidence in this case is plain and free from contradiction. It is all one way. No outside facts or circumstances throw any doubt over it, or detract from the testimony of all the witnesses. A clear case of absence without reasonable cause for over three years prior to the institution of the suit is proven. There is no suggestion of collusion. If, from the manner or conduct of the witnesses or parties, the trial court places no reliance on the case apparently made, and for that reason disregards all the testimony, it is very easy for him to make that appear of record. When it is so exhibited, the appellate court will hardly fail to follow him. But no such state of facts appears here. Not a word of testimony reflects upon the character of the plaintiff. It appears to be a case where the very foundation upon which all marriages should rest, that is to say, mutual affection, is absent. But that has nothing to do with the determination of the case. This is a case made out by evidence that entitles plaintiff to the decree. As important as it is to the safety of the community to preserve sacred and inviolate the marriage relation, courts cannot deny relief when a case is made out under the law. When a defendant, by her conduct, has furnished cause which our statute declares sufficient to entitle plaintiff to the relief which that statute gives him, he has a right,

granted by the law, to the decree—he himself not being in fault. This is a right secured to him in this as in all cases, by the command of our National and State Constitutions, that all our citizens shall be afforded the equal protection of the law. The legislative branch of our government, not the judicial, is, under our Constitutions, National and State, the lawmaking power. If our divorce laws are wrong, the place to amend them is in the Legislature, not in the courts.

The judgment of the circuit court is reversed and remanded, with directions to that court to enter up a decree awarding the divorce to the plaintiff. All concur.

STATE OF MISSOURI, Respondent, v. DIONIOCUS
THOTHOS, Appellant

St. Louis Court of Appeals. Submitted on Briefs March 7, 1910.
Opinion Filed March 22, 1910.

1. **AFFIDAVITS: Jurat.** A jurat to an affidavit is not part of the affidavit, but is merely evidence of the fact that an affidavit was taken and before whom taken
2. **CRIMES AND PUNISHMENTS: Indictments and Informations: Requisites.** An indictment or information must set out the charge with sufficient certainty to advise accused of the offense charged, so as to enable him to prepare his defense.
3. **———: Making False Affidavit: Variance Between Information and Proof.** The variance between an information charging accused with making a false affidavit before the excise commissioner and the evidence that the affidavit was made before a notary public in the office of the excise commissioner is fatal.
4. **———: ———: Indictment and Information: Definiteness: Statute of Jeofails.** An information charging accused with making a false affidavit before an officer authorized to administer oaths is too indefinite, as accused is entitled to know before whom he is charged with taking a false oath by designation of the office, and the defect is not remedied by the Statute of Jeofails.

Appeal from St. Louis Court of Criminal Correction.—
Hon. Wilson A. Taylor, Judge.

REVERSED.

William E. Fish for appellant.

We presume that the State will argue that the oath was made before an officer competent to administer oaths, but admitting that fact to be true, for the argument's sake, the unfortunate part of the State's reasoning will fail, as the defendant was charged with making a false oath before a different person, you cannot charge a defendant with making a false oath before one person, and introduce in evidence that it was made before some one else, as the defendant surely has the right to know with what he is to be confronted with at his trial. *State v. Nunley*, 185 Mo. 102; *State v. Gassard*, 103 Mo. App. 143; *State v. Mysenberg*, 171 Mo. 1.

Phillips W. Moss for respondent.

(1) Under the facts in the case the appellant was guilty of the offense charged in the information. (2) The information does not charge that the affidavit was made before Thomas E. Mulvihill, excise commissioner. The jurat which is attached to the affidavit is not a part of the affidavit and is mere surplusage. 21 Am. and Eng. Ency. Law, 753; *United States v. Neale*, 14 Fed. 767; *Rex v. Emden*, 9 East 437; 1 Am. and Eng. Ency. P. & P., p. 316; *Williams v. Stevenson*, 103 Ind. 243; *Kruse v. Wilson*, 79 Ill. 233; *Cook v. Jenkins*, 30 Ia. 452; *Theobald v. Railroad*, 75 Ill. App. 213. (3) Even if there be a variance between the allegations of the information and the proof as to the name of the officer before whom the affidavit was made, such variance is cured by the Statute of Jeofails. Secs. 2534, 2535, R. S. 1899; *State v. Wammack*, 70 Mo. 410; *State v.*

Rambo, 95 Mo. 465; State v. Dale, 141 Mo. 287; State v. Smith, 80 Mo. 521; State v. Sharp, 71 Mo. 221; State v. Decker, 217 Mo. 321.

REYNOLDS, P. J.—The information in this case charges the defendant with willfully, corruptly and falsely, under oath, voluntarily making a false affidavit for the purpose of obtaining a dramshop license. The charge in the information is that he made this voluntary false affidavit “before an officer authorized to administer oaths.” No name of the officer is given before whom the affidavit is charged to have been made, but at the end of the affidavit, as set out in the information, appears this: “Sworn to and subscribed before me this fifth day of February, 1908. Thomas E. Mulvihill, Excise Commissioner.” It appears in evidence that in point of fact the affidavit was not made before the excise commissioner but before a notary public named Haley, who was also a police officer and on duty in the office of the excise commissioner. While it is true, as alleged by the attorney for the state, that the jurat itself is not part of the affidavit, but mere evidence of the fact that an affidavit was taken and before whom taken, it is a fundamental rule of pleading in criminal causes that the indictment or information must set out the charge with sufficient certainty to advise the defendant of the offense with which he stands accused: with such certainty as to enable him to prepare his defense. Anyone reading the affidavit as it is set out in the information would assume that the affidavit had been taken before Thomas E. Mulvihill, excise commissioner. When the information charges that the affidavit was made “before an officer authorized to administer oaths,” and that is followed by this affidavit with its accompanying jurat and signature, no one reading it would arrive at any other conclusion than that it charged that that officer who had administered the oath was Mr. Mulvihill. When the proof of the state itself

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showed that Mr. Mulvihill had not administered the oath but that Mr. Haley had, there was a fatal variance between the allegata and probata. Furthermore, the information is defective in merely charging that it was before an "officer authorized to administer oaths." That is too indefinite to advise the defendant of the offense with which he is charged. He is entitled to know before whom he is charged to have taken the false oath, certainly by designation of the office, to be safe pleading, by the name of the officer. The Statute of Jeofails, which is relied upon by the attorney for the state, broad as it is, is not broad enough to cover this fatal defect in this information. The judgment of the Court of Criminal Correction is reversed.

GEORGE I. EDWARDS, Appellant, v. THE CITY OF KIRKWOOD and R. PAGENSTECHEER, Collector, Respondents.

St. Louis Court of Appeals, April 5, 1910.

1. **MUNICIPAL CORPORATIONS: Power to Contract: Constitutional Provisions.** Under section 48 of article 4 of the State Constitution, municipal corporations are inhibited from paying or authorizing the payment of moneys on contracts made without express authority of law, and such contracts are declared to be null and void.
2. ———: ———: **Contract for Legal Services: Presumption of Rightful Exercise of Authority: Pleading.** Where it appears a municipality is acting within its jurisdiction, the presumption of right and not of wrong attends its official acts, unless the contrary appears; so that, in a case where a municipality is sued on a contract for legal services, which, under section 5907, Revised Statutes 1899, as amended in 1903, the city had power to make, where there was a vacancy in the office of the city attorney or where the attorney was employed to assist the city attorney, the petition is not insufficient for failure to allege the existence of the vacancy or that plaintiff was employed to assist the city attorney, as the law will presume the city officers exercised their authority rightly, nothing to the contrary appearing.

3. ———: ———: **Employment of Counsel: Matter of Discretion.** The matter of employing counsel to represent a municipality in matters of controversy involves the exercise of discretion.
4. ———: **Delegation of Power.** While a municipality may delegate to an agent a mere ministerial act, unless expressly forbidden, yet discretion conferred upon one class of city officers by positive legislative direction may not be transferred or delegated to others.
5. ———: **Employing Counsel: Unauthorized Delegation of Authority.** Under section 5907, Revised Statutes 1899, as amended by Acts 1903, page 81, which provides that the mayor and board of aldermen of a city of the fourth class may by ordinance employ special counsel to represent the city in certain contingencies and pay reasonable compensation therefor, an ordinance of such a city, which directs the city collector to employ counsel, is an invalid delegation of the power of the mayor and board of aldermen.
6. ———: ———: ———: **Contracts.** A contract made by the city collector with an attorney, under such an ordinance, is *intra vires*, its only infirmity being that the power properly lodged in the mayor and board of aldermen was defectively executed.
7. ———: **Equitable Estoppel: Intra Vires and Ultra Vires.** An equitable estoppel may not be invoked against a municipality which has acted wholly beyond its power in entering into a contract, yet where the power to contract is clearly vested in a municipality and it is irregularly exercised, the doctrine of equitable estoppel will be applied, it being the rule that as to matters within the scope of their powers and the powers of their officers, municipal corporations may be estopped on the same principles and under the same circumstances as natural persons.
8. ———: ———: **Invalid Contract for Employment of Attorney: Acceptance of Service by City.** A municipal corporation, which had authority to engage special counsel by its mayor and board of aldermen, passed an ordinance authorizing the city collector to engage special counsel, said ordinance being void as an unauthorized delegation of the power of the mayor and board. Plaintiff was engaged by the city collector in accordance with the directions of the ordinance and performed the services for which he was engaged, the city receiving and retaining the benefit thereof. In an action for compensation for the services performed under the contract, *held*, that the city by accepting the fruits of the contract invoked the doctrine of equitable estoppel against itself and would not be

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heard to dispute the obligation to recompense plaintiff on the terms which induced his services.

9. ———: City Officers: Personal Liability. In every case the presumption is, that municipal officers act for their principal and not for themselves, unless something to the contrary appears; and when such officers act within their authority, they are held to a personal obligation only in those cases where by apt and appropriate language a clear intention to assume such is disclosed.
10. ———: ———: Scope of Authority: Persons Contracting Bound to Ascertain. Where the obligation of the public negotiated through its agent is sought to be enforced against the municipality, the rule obtains that every person is required at his peril to ascertain at the time the contract is entered into that it is within the scope of the authority which the law conferred on the officer.
11. ———: ———: Personal Liability of Officer: Mistake as to Law. A public officer, who avowedly contracts for the municipality only and acts in good faith, without misrepresentations of facts, will not be held personally liable for a mere defective execution of the power, which appears to have resulted from an error as to the law, induced by the concurrence of all the parties.

Appeal from St. Louis County Circuit Court.—*Hon. J. W. McElhinney*, Judge.

REVERSED AND REMANDED.

George L. Edwards, pro se.

Appellant's petition states a good cause of action. *Laws Missouri*, 1903, p. 81; 1 *Dillon's Mun. Corp.* (4 Ed.), sec. 479; *Reynolds v. Clark*, 162 Mo. 680; *State ex rel. v. Butler*, 164 Mo. 214; *Morrow v. Pike Co.*, 189 Mo. 610; *Simpson v. Stoddard County*, 173 Mo. 421.

Albert B. Chandler for respondent.

(1) Under the maxim *expressio unius exclusio alterius*, the powers of the city and the collector being both fixed by statute with reference to the employment of attorneys by either, plaintiff must state a case either

under sec. 5907, R. S. 1899 as amended, Laws 1903, p. 81, governing the appointment of city attorneys and employment of special counsel, or else under sec. 9302, R. S., governing the employment of a collector's tax attorney; one or the other. Const., Art. 4, sec. 48; Kolkmeier v. City of Jefferson, 75 Mo. App. 683; Carroll v. St. Louis, 12 Mo. 444; Heidelberg v. St. Francois Co., 100 Mo. 74; Miller v. Douglas Co., 204 Mo. 194; McKissock v. Mt. Pleasant Twp., 48 Mo. App. 416; Gordon v. Lafayette Co., 74 Mo. 426; Boucher v. City of Moberly, 74 Mo. 113; Lemoine v. St. Louis, 102 Mo. 419; Sec. 5942, R. S. 1899; Sec. 6759, R. S. 1899; Sec. 5977, R. S. 1899; Crutchfield v. City of Warrensburg, 30 Mo. App. 456. (2) No case is stated under said Laws 1903, p. 81, governing appointment of city attorneys and employment of special counsel. Rumsey v. Shell City, 21 Mo. App. 175; Carroll v. St. Louis, 12 Mo. 444; Phillips v. Butler Co., 187 Mo. 698; East St. Louis v. Thomas, 11 Ills. App. 283; Mayor of Baltimore v. Ritchie, 51 Ind. 233; Tiedeman, Mun. Corp., sec. 113; Ryce v. City of Osage, 88 Ia. 558; Clough v. Hart, 8 Kan. 495; Orton v. State, 12 Wis. 509; Ayres v. Schmohl, 86 Mo. App. 349; Knapp, Stout & Co. v. St. Louis, 156 Mo. 356, and authorities cited under first point. Sec. 6759, R. S. 1899. (3) The choice of counsel for the city involves the exercise of discretion and judgment. That discretion being imposed by statute upon the mayor and board of aldermen, they cannot shift it to another officer, the city collector here. It cannot be performed by deputy. *Delegata potestas not potest delegare*. State v. Butler, 178 Mo. 272; East St. Louis v. Thomas, 11 Ills. App. 283; Campbell v. St. Louis, 71 Mo. 106; Broom, Leg. Max. 839; Joyce, Elec. Law, sec. 236; Mechem, Pub. Off., sec. 567; 2 Abbott, Mun. Corp., p. 1575; Tiedeman, Mun. Corp., sec. 113; Throop, Pub. Off., sec. 571, *et seq.*; Lewis v. Lewis, 9 Mo. 187; Sheehan v. Gleeson, 46 Mo. 105; Pinney v. Brown, 60 Conn. 164; Ayres v.

Schmohl, 86 Mo. App. 349; Rich Hill v. Donnan, 82 Mo. App. 349; 1 Am. and Eng. Ency. Law (2 Ed.), 975. (4) No case is stated under section 9203, R. S. 1899, governing the appointment of tax attorneys for the city collector. Under this section, the delinquents have to pay the attorneys as an additional penalty, and no liability falls upon the public or the public officers. Only under this section can a tax attorney be engaged. Secs. 5942, 9302, R. S. 1899; State ex rel. v. Ewing, 116 Mo. 129; City of Hannibal v. Bowman, 98 Mo. App. 108; State ex rel. v. Smith, 13 Mo. App. 421; Madison Co. v. Commissioners, 140 Ill. 539; Secs. 9246, 9273, 9294, 9316, R. S. 1899; Justices v. Yoakum 19 Ga. 611; People v. Supervisors, 28 Cal. 429; Boggs v. Placer Co., 65 Calif. 561; Brennan's Appeal, 1 Walker (Pa. Sup.) 522. (5) A special public sewer fund, levied under section 5969, R. S. 1899, cannot be charged with the costs of its collection; does not have to "pay its own way;" and any ordinance or contract attempting to divert a part of it in this manner would be void. Cases dealing with the defense of special funds once they are in the treasury, have no bearing upon the questions in issue here as to how the fund is to be collected. State ex rel. v. Bishop, 36 Mo. 58; State ex rel. v. Thompson, 36 Mo. 65; State ex rel. v. Thompson, 37 Mo. 87; Secs. 5942, 5969, R. S. 1899; Const., art. 4, sec. 48. (6) Bearing in mind the remedies open to the collector, the words "or otherwise" in the ordinance and contract providing for enforcement of collections "by suit or otherwise," refer to other legal process open to the collector *ejusdem generis* with suit, such as seizure, sale, etc., and do not contemplate voluntary payments with which the collector's attorney has no connection, and do not allow him a pound of flesh from the body thereof. Anderson v. Hawks, 70 Miss. 639; Century Dictionary; Loring v. Proctor, 26 Me. 27; Conley v. State, 85 Ga. 365; Sims v. Trust Co., 103 N. Y. 478; Lewis v. Smith, 9 N. Y.

502, 61 Am. Dec. 714; Wallace v. Jones, 82 N. Y. Supp. 451; D. A. R. v. Schenley, 204 Pa. St. 582; Galveston Co. v. Gorham, 49 Tex. 290; Donley v. Bank, 40 Ohio St. 50; State ex rel. v. Wood Co., 72 Wis. 637.

STATEMENT.—This is a suit on an express contract for attorney's fees. The court sustained a demurrer to the petition and plaintiff appeals. Omitting formal parts, the petition is as follows:

"Now comes the plaintiff and, by leave of court first had and obtained, files this, his amended petition, and says:

"Plaintiff states that the defendant, the city of Kirkwood, is now, and was at all the times hereinafter mentioned, a city of the fourth class, duly organized under the laws of the State of Missouri, providing for the organization of cities of said class; that the defendant, Rudolph Pagenstecher, is now, and was at all the times hereinafter mentioned, city collector for said city.

"For cause of action, plaintiff states that on or about the 20th day of February, A. D. 1905, the board of aldermen of the city of Kirkwood duly passed, and the mayor thereof approved, a certain ordinance, being numbered 302 and entitled 'An Ordinance Creating and Defining the Courses and Providing for the Construction of Public Sewers in the City of Kirkwood,' and whereby it was declared to be necessary for sanitary purposes that public sewers be established and constructed in said city and whereby the same were established, the courses, routes and dimensions set forth and the manner and method of constructing the same also set forth, as well as the manner and method of paying for the same, a copy of which said ordinance is herewith filed and referred to for greater certainty as to the terms and provisions thereof, and marked 'Exhibit A.'

“That on the—day of—, A. D., 1905, in pursuance to the provisions of the above-mentioned ordinance, the defendant, the city of Kirkwood, made and entered into a contract with Thomas J. Byrne for the construction of the public sewers by said ordinance established, and whereby said Thomas J. Byrne contracted and agreed to build and construct for said city the public sewers created and established by said ordinance, in pursuance to the terms and provisions of said ordinance, and whereby said city agreed to pay said Thomas J. Byrne therefor the sum of \$— payable monthly, as said work progressed, as provided in said contract a copy of which is herewith filed and referred to for greater certainty as to its terms and provisions, and marked ‘Exhibit B.’

“That thereafter, for the purpose of providing a fund and the money with which to pay for the construction of said public sewers, and on or about the first day of May, A. D. 1905, the board of aldermen of the city of Kirkwood duly passed, and the mayor thereof approved, a certain ordinance, being numbered 318, and entitled ‘An Ordinance Levying a Special Sewer Tax to Provide a Fund for the Building of Public Sewers in the City of Kirkwood,’ and whereby a tax, equaling the sum of thirty-four thousand three hundred dollars (\$34,300), was levied upon all the property made taxable for state purposes over the whole of the defendant, the city of Kirkwood, and the city clerk of said city ordered to extend the said tax upon said property and make out appropriate and accurate tax books setting forth in suitable columns, opposite the names of each person and the item of taxable property as returned by the assessor and board of equalization, the amount of said taxes due thereon, apportioning the said sum of money levied among the several owners of all said property according to the respective valua-

tion thereof, and whereby it was provided when said taxes should be paid.

"By said ordinance it was further provided that the city clerk, as soon as said tax books were completed, should deliver the same to the city collector and charge the city collector with the full amount of taxes levied, and the said city collector directed, as soon as said tax should become due and payable, to proceed to collect the same, a copy of which said ordinance is herewith filed and referred to for greater certainty as to its terms and provisions, and marked 'Exhibit C.'

"That at all of the times hereinbefore and hereinafter mentioned, the St. Louis Union Trust Company was a corporation duly organized under the laws of the State of Missouri and engaged in a general trust company business, with its chief office and place of business located in the city of St. Louis and State of Missouri, and the executor of the estate of A. S. Mermod, deceased, having been duly appointed as such by the probate court of the county of St. Louis, Missouri, and having duly qualified and entered upon the discharge of the duties of its said office.

"In pursuance to the last above-mentioned ordinance, being Ordinance No. 318, the clerk of the city of Kirkwood prepared and delivered to the city collector the tax books in said ordinance provided for; that from said books it appeared that a tax for the purpose of paying for the construction of said public sewers, in the aggregate amounting to about the sum of nine thousand dollars (\$9000) had been levied against the estate of A. S. Mermod, deceased; that thereafter and on or about the — day of —, 1905, the St. Louis Union Trust Company, as executor of the estate of A. S. Mermod, deceased, commenced a proceeding by *certiorari* in the circuit court of St. Louis county, Missouri, against the defendant, the City of Kirkwood, and its officers, entitled State of Missouri ex rel. Union Trust Company, etc., Relator v. The

City of Kirkwood, C. G. Ricker, J. G. Hawken and R. Pagenstecher, the general object and nature of which said proceeding was to have the circuit court of St. Louis County, Missouri, quash and declare to be illegal, null and void the said tax levied by said ordinance, numbered 318, above mentioned, and particularly the portion of said tax levied upon and taxed against the estate of said A. S. Mermod, deceased, a copy of the petition of the relator in which said cause and the return of the respondents thereto is herewith filed and referred to for greater certainty as to the terms and provisions thereof, and marked 'Exhibit D.'

"That subsequent to the passage and approval of said last mentioned ordinance No. 318, and the levying of said tax and making the tax books therein provided for, and the delivery of the same to the collector of the city of Kirkwood, a large number of the owners of property in said city, upon whose property said tax had been levied, paid the amount levied thereon to the collector of said city when the remaining owners of property in said city, upon whose property said tax had been levied, either refused or neglected to pay the same. It thereupon became necessary for the city to adopt means and measures for the collection of the remainder of said tax amounting to about twenty thousand dollars (\$20,000) and to employ counsel to aid the collector of said city in further collecting the same, and to defend the suit commenced against said city by the St. Louis Union Trust Company above referred to, and such other suits as might be commenced against said city to prevent the collection of the remainder of said tax, the property-owners, or some of them, of said city who had failed or refused to pay said tax, having threatened to commence other suits for said purpose against said city; that owing to the fact that the contractor with said city, for the construction of said public sewers, had entered upon the performance of the terms and conditions of his said contract and the con-

struction of said public sewers, and said city, in pursuance to said contract, was required to pay him for the work performed under said contract, monthly, it was necessary that said city should collect said tax expeditiously and without suit, if possible, that it might be enabled to perform its said contract with said contractor and pay him for the work done monthly as provided in said contract; that to that end, and with said objects in view, on or about the 11th day of September, A. D. 1905, the board of aldermen of the city of Kirkwood duly passed, and the mayor thereof approved, a certain ordinance, being numbered 323, and entitled 'An Ordinance Directing the Collector of the City to Enforce Payment of the Unpaid Portion of the Special Public Sewer Taxes,' and whereby the collector of said city was authorized and required to employ an attorney to aid, assist and advise him in the enforcement and collection of said taxes levied by said Ordinance No. 318 of said city above mentioned, and authorized and required to pay to such attorney as he might employ therefor 10% on all such special public sewer taxes collected subsequent to the date of the employment of said attorney; that in pursuance of said last above mentioned ordinance, the defendant, R. Pagenstecher, on the 16th day of September, A. D. 1905, made and entered into with plaintiff a certain contract whereby he employed plaintiff to aid, assist and advise him in the enforcement and collection of the unpaid portion of said special public sewer taxes, and agreed to pay plaintiff, for such services as he might render him in that behalf, the sum of ten per cent on all special public sewer taxes collected by suit or otherwise, subsequent to the date of said contract; that the defendant, the city of Kirkwood, and the defendant, R. Pagenstecher, as well as the plaintiff, intended and understood that, by virtue of the ordinance and contract last above mentioned, it was the duty of the plaintiff to defend the case commenced against said city and its

officers by the St. Louis Union Trust Company above mentioned, and any other suit which might be commenced against said city or its officers for the purpose of preventing the collection of said special public sewer taxes and to assist and aid the collector of said city to collect said taxes without suit, if possible, and that only such suits should be commenced for that purpose, if any, as plaintiff might deem advisable; that immediately upon the execution of said contract, plaintiff entered upon the performance of the terms and conditions thereof obligatory upon him, defended said suit, commenced against said city and its officers by the St. Louis Union Trust Company above mentioned, and has faithfully performed each and every term and condition of said contract obligatory upon him, except wherein prevented from so doing by the act of the defendants; that through the aid and assistance of the plaintiff, subsequent to the date of said contract, the defendant, R. Pagenstecher, collected of said taxes more than the sum of ten thousand dollars (\$10,000) but has failed, neglected and refused, though demand therefor has been made, to pay plaintiff ten per cent thereof, as agreed to be paid him, or any part thereof, but has delivered and paid over the full amount of said taxes so collected to the defendant, the city of Kirkwood; that, although plaintiff has demanded of defendant, the city of Kirkwood, that it pay to him ten per cent of the amount of said taxes so collected and turned over to said city by the defendant, R. Pagenstecher, said city has failed, neglected and refused to pay said sum to plaintiff or any part thereof.

Wherefore plaintiff says he has been, and is, damaged in the full sum of one thousand dollars (\$1000), for the recovery whereof against both of said defendants, he prays judgment and that by said judgment the defendant, the City of Kirkwood, may be directed and decreed to pay to plaintiff said sum of one thou-

sand dollars (\$1000) out of said moneys so collected by said defendant, R. Pagenstecher, and paid to said city of Kirkwood as above stated, and for his costs in this behalf expended."

NORTONI, J. (after stating the facts).—It is argued that the petition fails to disclose the contract relied upon therein was within the powers of the municipal corporation. We are admonished by a great jurist that in determining the extent of the power of a municipal corporation to make contracts and in ascertaining the mode in which such power is to be exercised, careful attention should be given to the charter provisions of the municipality and the general legislation of the state on the subject, if there be any. And it is said where there are express provisions on the subject those will, of course, measure the authority of the corporation as far as they extend. [1 Dillon on Municipal Corporations (4 Ed.), sec. 443.] After looking into the matter, it is ascertained that section 48 of article 4 of the State Constitution provides "The General Assembly shall have no power to grant, or to authorize any . . . municipal authority to . . . pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement . . . made without express authority of law; and all such unauthorized agreements or contracts shall be null and void." The inhibition of the constitutional provision is obviously leveled against the power of municipalities to either pay or authorize the payment of moneys on contracts made without express authority of law and it says, too, that contracts made without such express authority shall be null and void. Accepting the allegations of the petition as true, it appears the defendant, Kirkwood, is a city of the fourth class organized and existing under the general laws of this State to be found in article 5, chapter 91,

Revised Statutes of Missouri 1899 as amended. See also article 5, chapter 91, Ann. St. 1906. In these provisions may be found the charter powers of the city. Among other powers therein conferred upon the mayor and board of aldermen is one to employ counsel to represent the city in certain cases. [Section 5907, R. S. 1899, as amended in 1903.] See Laws of Missouri, 1903, page 81, Ann. St. 1906, sec. 5907. This statute provides "if deemed for the best interests of the city, the mayor and board of aldermen may by ordinance employ special counsel to represent the city either in a case of vacancy in the office of city attorney or to assist the city attorney and pay reasonable compensation therefor." The plaintiff relies upon this statutory provision for express authority authorizing the city to enter into the contract with him declared upon in the petition. It is urged on behalf of the city that even though this statute confers authority upon the mayor and board of aldermen to employ special counsel by ordinance, the petition is fatally defective in that it fails to allege there was either a vacancy in the office of city attorney at the time the contract was made or that the plaintiff was employed to assist the city attorney as mentioned in the statute. We are not impressed with this argument, for if the petition is otherwise sufficient, and nothing appears to the contrary, the law will presume the city officers exercised their authority rightly; that is to say, it will be presumed either that there was a vacancy in the office of city attorney or that the plaintiff was employed to assist such city attorney if the city had such an officer. Even in cases of municipalities and tribunals of limited authority, when it appears they are acting on a given matter within their jurisdiction, the presumption of right and not of wrong attends their official acts unless the contrary appears. [Rutherford v. Hamilton, 97 Mo. 543, 11 S. W. 249; Aurora Water Co. v. Aurora, 129 Mo. 540, 31 S. W. 946; Asphalt Paving Co.

v. Ullman, 137 Mo. 543, 38 S. W. 458; State to use v. Crumb, 157 Mo. 545, 57 S. W. 1030.]

It is argued that though the petition charges the city duly passed an ordinance, which, of course, includes the action of the mayor and the board of aldermen, authorizing the employment of an attorney, it does not appear in the petition that such ordinance authorized the employment of the present plaintiff in that capacity. It is said although the ordinance directed and required the defendant, city collector, Pagenstecher, to employ counsel on the terms therein specified and that he did so, the contract so entered into by the collector was wholly ineffective and void for the reason the legislative department of the municipality could not delegate its discretion in that behalf. This argument we accept as sound in principle for the charter provision to be found in section 5907 as amended is to the effect that the mayor and board of aldermen may by ordinance employ counsel if deemed for the best interest of the city. The matter of employing counsel to represent the municipality in matters of controversy certainly involves the exercise of discretion. As a general proposition, the discretion of municipal governments resides in the lawmaking power. In this case, the statute in plain terms lodges the discretion as to the employment of counsel with the mayor and board of aldermen to be exercised by them, "if deemed for the best interest of the city." And furthermore it directs that body to exercise the power conferred in the usual manner by passing an ordinance to that effect.

It is true the mayor and board of aldermen did pass an ordinance which directed the collector to employ counsel, but so far as the allegations of the petition disclose, the matter of discretion as to what particular counsel should be employed was attempted to be delegated to the collector, for it is not averred that the collector was directed by ordinance to employ the

plaintiff. Had the ordinance directed the collector to employ plaintiff on the terms specified, the contract thereafter made by the collector with plaintiff in accordance with the ordinance would be entirely valid. In such circumstances, the discretion as to the particular counsel to be employed would have been exercised by the proper authority and the act of entering into the contract by the collector would have been ministerial in character only. It is always competent for a municipality to delegate to an agent the execution of a mere ministerial act unless restrained by express provisions to the contrary. [Ruggles v. Collier, 43 Mo. 352; Hannibal & St. Jo. R. R. Co. v. Marion Co., 36 Mo. 294; 1 Dillon on Municipal Corporations (4 Ed.), sec. 96; 20 Am. and Eng. Ency. Law (2 Ed.), 1218.] But when the grant of power is to the mayor and board of aldermen to act upon a given subject if deemed for the best interest of the city, as in this case, it involves a discretion which they may not delegate to another. Such a grant involves the idea that the mayor and board of aldermen are to act as one deliberative body to the end that they may assist each other by their united wisdom and experience, and the result of their conference be the ground of their determination. The discretion thus conferred upon the particular tribunal relates not alone as to whether the best interests of the city demand the employment of a counsel and the subsequent passage of an ordinance to that effect, if the question be determined in the affirmative, but requires as well that they shall exercise their discretion as to who shall be so employed as such counsel. Legislative power implies judgment and discretion upon the part of those who exercise it, and a special confidence and trust upon those who confer it. The discretion thus involved, therefore, may not be delegated to another unless expressly authorized. [Ruggles v. Collier, 43 Mo. 352; St. Louis to use of Murphy v. Clemens, 43 Mo. 395; 1 Dillon on Municipal Corporations

(4 Ed.), sec. 96; 20 Am. and Eng. Ency. Law (2 Ed.), 1217.] That discretion conferred upon one class of city officers by positive legislative direction may not be transferred or delegated to others is a proposition universally true. [Sheehan v. Gleeson, 46 Mo. 100; City of St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470; East St. Louis v. Thomas, 11 Ill. App. 283; Pinney v. Brown, 60 Conn. 164; Broom's Legal Maxims (7 Ed.), 838; Joyce on Electric Law (2 Ed.), sec. 236; Mechem's Public Officers, sec. 567; Tiedeman on Municipal Corporations, sec. 113; Throop's Public Officers, sec. 573; 1 Am. and Eng. Ency. Law (2 Ed.), 975, 976.]

The case of East St. Louis v. Thomas, 11 Ill. App. 283, is directly in point to the effect that the power to appoint an attorney, being vested by charter in the city council, it cannot be delegated to the mayor by ordinance or otherwise. And an ordinance providing that in certain contingencies the mayor may appoint an attorney is void.

While the contract with the city declared upon in the petition is void and unenforceable for the reason stated, it is not void for *ultra vires*. It is within the power of the municipality to make such contract for the employment of counsel as indicated by the statute referred to. In so far as the city is concerned, the contract is *intra vires* and its infirmity lies only in the fact of defective execution of the power properly lodged in the mayor and board of aldermen.

Whatever may be said on the application of the doctrine of estoppel to municipal corporations with respect to *ultra vires* engagements or contracts expressly prohibited by law, is irrelevant here for the reason the case presents no such question and it will not be noticed. It is certainly now well settled that the doctrine of estoppel applies with full force to municipal corporations in those cases where the contract is within the power of the corporation and is

infirm only in the mode or manner of its execution. There is a distinction made, too, in some of the cases where the doctrine of estoppel is invoked as to contracts which had been performed in good faith by one dealing with either a municipal or private corporation and the infirmity lies in a defect of power with respect to a matter not prohibited by law. In such cases, presenting a defect of power in the first instance; that is, where the power was not expressly conferred upon the corporation to enter into the contract and such contract was not expressly prohibited, the courts have sustained and enforced the plaintiff's right to recover in suits on the contract by applying the doctrine of estoppel when to do otherwise would entail an unjust result. In those cases, it appeared the plaintiff had acted in good faith and performed his part of the engagement by incurring expense and trouble, the fruits of which were accepted and appropriated by the defendant corporation. See *Hitchcock v. Galveston*, 96 U. S. 341; *State Board of Agriculture v. The Citizen's Street R. W. Co.*, 47 Ind. 407. However, unless most carefully scrutinized, those cases would seem to extend the doctrine quite beyond the limits generally accepted to be sound on principle when applied to municipal corporations. [1 *Dillon on Municipal Corporations* (4 Ed.), 457.]

The authorities generally go to the effect that the doctrine of an equitable estoppel may not be invoked as to municipalities which have acted wholly beyond their power in entering into the contract. But it is not so where it appears as here, that the contract relied upon was one within the express powers conferred. The principle of the authorities referred to is that one cannot do indirectly what cannot be done directly, and where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel. However, where the power is clearly vested in the municipality and it is

irregularly exercised or there are defects and omissions in exercising the authority conferred by law, as in this case, which presents only the defective execution of the power, the doctrine of equitable estoppel, it is said, may well be applied by the courts. Indeed, it is the universal rule that as to matters within the scope of their powers and the powers of their officers such corporations may be estopped upon the same principles and under the same circumstances as natural persons. See 2 Herman on Estoppel, sec. 1222; *Motz v. Detroit*, 18 Mich. 496; *Brown v. Bowen*, 30 N. Y. 519; *Moore v. The Mayor, etc.*, 73 N. Y. 238.

It is the doctrine, too, of our own Supreme Court that where a municipal corporation enters into a contract within its powers, the doctrine of estoppel obtains with the same force as against individuals. [*Union Depot Co. v. City of St. Louis*, 76 Mo. 393; *Union Depot Co. v. City of St. Louis*, 8 Mo. App. 412.] For an application of the same doctrine in the case of a county which had contracted within its powers but had defectively executed the power conferred, see the recent case of *Simpson v. Stoddard Co.*, 173 Mo. 421, 463, 464, 465, 466, 73 S. W. 700.

It appears from the allegations of the petition, which stand confessed by the demurrer, that immediately upon the defective execution of the power by contracting through its collector for the services, plaintiff entered upon and discharged, in a large measure, the terms and conditions of the contract. He defended certain suits then pending and faithfully performed each and every condition of the contract on his part until prevented by the city authorities. It is averred that through his aid and assistance the city collector collected more than \$10,000 of the taxes and paid them over to the city of Kirkwood and both the city and the collector have wholly failed and refused to recompense him for his services. Under these circumstances, the most elementary principles of natural justice re-

quire that plaintiff should be compensated for such services as he has rendered. By accepting the fruits of the contract and appropriating the moneys arising from the plaintiff's efforts thereunder, the defendant city, through its voluntary act, has invoked the principle of an equitable estoppel above referred to and it may not now dispute the obligation to recompense plaintiff on the terms which induced his services. In so far as the city is concerned, the demurrer should be overruled.

As to the co-defendant, Pagenstecher, the city collector, we believe the demurrer was rightfully sustained, for it appears throughout the petition that he acted only in his official capacity under the ordinance requiring him to contract with an attorney, and there is not a word indicating that he intended to assume a personal obligation. In every case, the presumption is that municipal officers act for their principal and not for themselves, unless something to the contrary appears. When such officers act within their authority, they are held to a personal obligation only in those cases where by apt and appropriate language a clear intention to assume such is disclosed. [1 Dillon (4 Ed.), sections 452, 453, 454; Mechem's Public Officers, sec. 818.] As the powers and duties of such officers are defined and marked out by the law, they are open to ascertainment for one and all alike. In this respect, there is a distinction between a public and a private agency. In those cases, therefore, where the obligation of the public negotiated through its agent, is sought to be enforced against the municipality, the rule obtains that every person is required at his peril to ascertain at the time the contract is entered into that it is within the scope of the authority which the law conferred upon the officer. [Cheeney v. Brookfield, 60 Mo. 53; Mister v. Kansas City, 18 Mo. App. 217; Mechem's Public Officers, sec. 829; 1 Dillon (4 Ed.), Municipal Corporations, 447.]

From these principles, it would seem to be just that a public officer, who avowedly contracted for the municipality only, and acted in good faith without any misrepresentation of facts, ought not to be held personally liable for a mere defective execution of the power which appears to have resulted from an error as to the law, induced by the concurrence of all parties. While there are authorities to the contrary, the rule in this State is that an officer of a municipality, contracting officially and under an innocent mistake of the law in which the other party, with equal opportunities of knowledge, participated, neither party at the time intending to affix a personal liability, will be adjudged not personally liable on the contract. [Humphrey v. Jones, 71 Mo. 62.] This rule we believe to be eminently just, and especially so in the particular instance now in judgment, for it appears here that plaintiff is a lawyer and, therefore, was possessed of as much, if not more, information touching the legality or illegality of the power being exercised by the collector in entering into the contract sued upon, than either the collector, mayor or board of aldermen. In such circumstances, the doctrine is generally accepted to be sound. See Mechem's Public Officers, sec. 809; 23 Am. and Eng. Ency. Law (2 Ed.), 381 and note 4 to sec. 237 of 1 Dillon on Municipal Corporations (4 Ed.). The petition failed to state a cause of action against the defendant, Pagenstecher, personally, and as to him the demurrer was properly sustained.

That the case may proceed against the city, the judgment will be reversed and the cause remanded. It is so ordered. All concur.

F. L. MARCHAND, Trustee, Appellant, v. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY et al., Respondents.

St. Louis Court of Appeals, April 5, 1910.

1. **VENDOR'S LIEN: Does not Exist, When.** Where, in a sale of land, it appears a covenant was substituted for a money consideration and was in fact the thing bargained for, a vendor's lien does not exist, for under such circumstances it conclusively appears to have been waived.
2. ———: **Nature of: Not an Estate.** A vendor's lien is not an estate, but is a mere right existing potentially only and without any tangible existence, and exists only as an incident to the obligation to pay the price, and if there is no such obligation, there can be no lien.
3. ———: **Collateral Covenants: Lien Held not to Attach: Facts Stated.** A conveyance was executed and delivered in consideration of certain cash in hand, and covenants contained in the deed obligated the grantee, its successors and assigns, to construct and maintain an intake or passway for water from a river across the lands granted to adjacent lands of the grantor, and to maintain a backwater gate therein. The covenants affixed no obligation to pay either money, property, or services as a consideration for or in lieu of performance, but merely recited that the grantee agreed faithfully to perform. The grantee and its successor in title failed to perform this covenant, and the grantor brought suit to enforce a vendor's lien against the land. *Held*, that the proceeding could not be sustained for the reason said covenants in no manner affixed an obligation to pay either money, property or services as a consideration for the land, but instead substituted a personal obligation to perform distinct undertakings.

Appeal from Lewis Circuit Court.—*Hon. C. M. Stewart*, Judge.

AFFIRMED

R. G. Blair and *O. C. Clay* for appellant.

Respondent's grantor, promised and agreed in writing, to build by October 1, 1880, the passway and

watergap in question, as part consideration for the land it bought from Blair, and the building of which structures, respondents now concede is reasonably worth the sum of \$700, and this consideration was open and expressed upon the face of Blair's deed. This watergap and backwater gate, respondents concede was never, at any time built. Then there was a failure to that extent, of the consideration, that Blair was to have gotten for his land, and for such failure of the consideration, Blair certainly has a lien for unpaid purchase price. *Johnson v. Burks*, 103 Mo. App. 221; *Major v. Bukley*, 51 Mo. 227; *Pratt v. Clark*, 57 Mo. 189; *William v. Crow*, 84 Mo. 298; *Bishop v. Seal*, 87 Mo. App. 256; *Simily v. Adams*, 88 Mo. App. 621; *Johnson v. Burks*, 103 Mo. App. 221.

H. H. Trimble, Palmer Trimble and R. W. Ray
for respondent.

A breach of the covenant sued on sounds in damages and cannot be made the subject of a vendor's lien. *Brawley v. Catron*, 8 Leigh 522; *McCandless v. Keen*, 13 Grat. 615; *Hiscock v. Norton*, 42 Mich. 320; *Campbell v. Campbell*, 21 Mich. 438; *Payne v. Avery*, 21 Mich. 524; *Arlin v. Brown*, 44 N. H. 102; *Harris v. Hanie*, 37 Ark. 348; *Bell v. Pelt*, 51 Ark. 433; *McDonald v. Land Co.*, 78 Ala. 382; *Walker v. Struve*, 70 Ala. 167; *Patterson v. Edwards*, 29 Miss. 71; *Barlow v. Delaney*, 36 Fed. 577; *Peters v. Tunell*, 43 Minn. 473; *Chase v. Peck*, 21 N. Y. 581; *Chapman v. Beardsley*, 31 Conn. 115; *Meigs v. Dimock*, 6 Conn. 458; *Jones, Liens*, sec. 1071; *Griffin v. Bower*, 7 S. & R. (Pa.) 64, s. c., 10 Am. Dec. 428; *Whitely v. Trust Co.*, 76 Fed. 74; *Clark v. Royle*, 3 Sim. 499; *Parrott v. Sweetland*, 37 My. & K. 656; *Hammond v. Paton* (Mich.), 34 N. W. 72; *Clark v. Stilson*, 36 Mich. 482; *Warner v. Blivens* (Mich.), 87 N. W. 49; *Gard v. Gard*, 108 Cal. 19, 40 Pac. 1059; 3 *Pomeroy Eq. Juris.*, section 1251; *Perry on Trusts* (4 Ed.), section 235.

NORTONI, J.—This is a suit in equity, on a covenant, the purpose of which is to enforce a vendor's lien upon certain real estate occupied by defendant as parcel of its railroad right of way. The court sustained a demurrer to the petition and plaintiff prosecutes the appeal. The petition is an extended document and it will not be copied in full. So many of the facts therein set forth as are material only will be mentioned.

It appears that plaintiff, F. L. Marchand, is trustee under the will of James G. Blair, deceased, and as such trustee is the proper party plaintiff. The petition discloses substantially that in his lifetime, James G. Blair owned a parcel of real estate consisting of about thirty acres in Lewis county adjacent to the Mississippi river and the defendant's predecessor in title, the St. Louis, Keokuk & Northwestern Railway Company, entered upon and constructed its railroad across the same and adjacent to the west bank of the Mississippi river. It seems the railroad appropriated the defendant's land to its use without either condemning the right of way or procuring a right to do so from the owner. However this may be, on February 2, 1880, James G. Blair and wife conveyed by a competent deed of general warranty to the said St. Louis, Keokuk & Northwestern Railway Company a right of way across said lands together with a narrow strip of land lying between the railroad and the west bank of the Mississippi river. This conveyance was executed by Mr. Blair and his wife and delivered to the railroad company in consideration of three hundred dollars, cash in hand, and certain covenants contained in the deed whereby the railroad company obligated itself and its successors and assigns, among other things, to construct and maintain an intake or passway for water from the Mississippi river under the railroad tracks to and upon the remaining land adjacent to the west side of the railroad, owned by Mr. Blair. It was cove-

nanted, too, that the railroad would construct and maintain a certain backwater gate thereat to the end of preventing the Mississippi river from overflowing Blair's land through the passway at such times as the river might overflow. This passway under the railroad and backwater gate were to be completed on or before October 1, 1880.

The deed from Blair and wife to the railroad company containing the covenant mentioned was duly accepted by the railroad and spread of record in the deed records of Lewis county on March 12, 1880.

The grantee in the deed wholly failed and omitted to construct the passway and water gate required by the covenant therein. And it seems the successors and assigns of such grantee have wholly failed to do so. Through several mesne conveyances, not necessary to mention in detail, the defendant, Chicago, Burlington & Quincy Ry. Co., succeeded to the title thus acquired by the St. Louis, Keokuk & Northwestern Ry. Co., grantee, under the deed from Blair with full notice of the covenants contained in such deed, which covenants are as follows:

“And whereas the said second party in consideration of the contract and agreement upon the part of the said James G. Blair as aforesaid, and of this conveyance, hath contracted, covenanted and agreed with said James G. Blair that it and its successors and assigns shall and will on or before the fifteenth day of April next, erect and build upon and along the west line of the tract so as aforesaid sold and hereinafter conveyed to said second party a good and substantial fence of sufficient height and strength to turn cattle and other stock and to prevent the same from passing over and through the same except at the passway and watergap hereinafter specified; and that said second party, its successors and assigns shall and will maintain and keep said fence when so erected and built in good repair and condition so as to turn cattle and

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other stock and prevent the same from passing over and through the same; and that it, its successors and assigns shall and will on or before the first day of October next (A. D. 1880), erect and build a watergap and passway at the south end of the tract hereinafter conveyed where an opening now exists under said railroad track so as to connect with the Mississippi river and the land of the said James G. Blair adjoining the land hereinafter conveyed to said second party on the west of the said watergap to be not less than twenty feet wide north and south and to extend sufficiently far into the river to afford water for stock grazing, pasturing and running upon the remaining portion of said tract owned by said James G. Blair as aforesaid, when said river shall or may be at low water-mark. The passway under said railroad from said land of said first party aforesaid to said watergap to be made and kept in good condition so that cattle and other stock can pass from said land of said James G. Blair to said watergap with ease and safety.

“And the second party and its successors and assigns shall and will erect and make in said passway under said railroad a backwater gate so as to prevent the water from the river when the same is rising, from backing upon or overflowing the said land of the said James G. Blair aforesaid. Said passway to be kept open except in high waters; and said second party and its successors shall keep said passway and watergap in good condition and repair so as to prevent cattle and other stock from passing over or through the same or escaping from the land of said James G. Blair aforesaid out of or through same; and shall maintain and keep said backwater gate in good condition and repair; which said passway to run under said railroad and to the river therefrom, shall be held and used by said James G. Blair, his heirs and assigns solely and exclusively.

“And the said James G. Blair, his heirs and assigns, shall free of charge have the right and privilege of joining, attaching and uniting any fence that he or they may erect or build on the tract of said James G. Blair adjoining the tract herein conveyed to the said second party, on the west side thereof as aforesaid, with the said fence so as aforesaid to be erected on the west line of the tract herein conveyed to the said second party.

“And said second party does hereby covenant and agree for itself and successors and assigns with said James G. Blair, his heirs and assigns, that it, its successors and assigns shall and will faithfully perform and carry out the said several contracts, covenants and stipulations upon its and their and each of their respective parts.”

It is averred that though the original grantee and its assigns, including the present defendant, have continued to hold and enjoy the lands thus acquired ever since, they, and each of them, have at all times failed and omitted to perform the obligation of the covenant by constructing the passway and backwater gate as agreed. In concluding, the petition recites that the reasonable value of the work and material necessary to erect and build said watergap, passway and water gate at the date of the deed from James G. Blair and wife to the St. Louis, Keokuk & Northwestern Ry. Co. and on October 1st next thereafter, was seven hundred dollars, for which sum, with interest thereon at the rate of six per cent per annum from such date, judgment is prayed and that said seven hundred dollars, with interest thereon be charged as vendor's lien upon the right of way so conveyed by James G. Blair to the St. Louis, Keokuk & Northwestern Ry. Co., and the road bed, railroad ties and iron rails thereon where the same runs through the land mentioned.

The case stated presents a remarkable feature in that it seeks to reduce the covenants for the perform-

ance of the obligations therein entailed to a monetary value and then extend a vendor's lien upon the lands for the amount so ascertained. According to the settled principles of equity jurisprudence, which authorize and attend the enforcement of a vendor's lien, it is obvious that such a proceeding may not be sustained, for the reason that the covenants in no manner affix an obligation to pay either money, property, or services as a consideration for the land, but instead it substitutes for the price or consideration money a personal obligation to perform distinct undertakings as therein indicated. The authorities are unanimous to the effect that if it appear a covenant is substituted for the consideration money and was in fact the thing bargained for, the vendor's lien will not exist, for in such circumstances it conclusively appears to have been waived. Such has been the arbitrary rule of decision in chancery jurisprudence from the earliest history of vendor's liens, as will appear by reference to the following authorities. The doctrine found its origin, we believe, in *Clark v. Royle*, 3 Sim. 499. See also *Parrott v. Sweetland*, 3 My. & Ke. 655. That such is the accepted rule of decision, see the following authorities: 3 Pomeroy's Equity Jur., secs. 1251, 1252; 1 Perry on Trusts (4 Ed.), sec. 235; 29 Am. and Eng. Ency. Law (2 Ed.), 743, 744, 745; 2 Jones on Liens, sec. 1071; Bispham's Equity (5 Ed.), sec. 355; 2 Washburn on Real Property (6 Ed.), sec. 1038; *Brawley v. Catron*, 8 Leigh (Va.) 522; 2 Sugden on Vendors, 380, 381; *Hiscock v. Norton*, 42 Mich. 320; *McKillip v. McKillip*, 8 Barb. (N. Y.) 552; *Whiteley v. Central Trust Co.*, 76 Fed. 74.

For the purposes of the case, we may assume that the covenants contained in the Blair deed are real covenants and that they follow the title to the land operating a like obligation on subsequent grantees, but after conceding this, we are unable to perceive how

such covenants may be reduced to a monetary value as is sought in the bill before us and the amount of such value enforced as a vendor's lien upon the land. It is certain that no express lien for the security of the performance of such covenants appears to have been reserved in the deed, and in the absence of an express intention to that end appearing, none may be enforced except upon the ground that an implied vendor's lien arises to secure the performance of covenants indicating something other than the payment of money, property, services or other valuable exchange as the purchase price in whole or in part.

That a vendor's lien may be enforced in the courts of this State in a proper case is beyond question. However, the vendor's lien is not an estate but on the contrary it is a mere right, existing potentially only and without any tangible existence. Such right exists only as an incident to the obligation to pay the price for the land and if there is no obligation to pay the consideration in some valuable exchange, there is certainly no right to enforce as incident thereto.

In *Gilman v. Brown*, 1 Mason 191-212, Fed. Cas. No. 5441, Justice STORY says the rule affording a vendor's lien under proper circumstances is manifestly founded on a supposed conformity with the intention of the parties, upon which the law raises an implied contract; and therefore it is not inflexible, but ceases to act when the circumstances of the case do not justify such a conclusion. It is therefore obvious, when it appears the parties intended payment of the purchase price shall not be made in money, property, services or some other valuable exchange, that no vendor's lien may be enforced as a result of an implied intention to secure the payment. In this view, it has been held from the beginning, if it appears that for the consideration of the conveyance covenants are taken which require the covenantee to perform collateral matters other than the payment of some valuable exchange, no

lien will be implied for the performance of such covenants unless the same is expressly reserved in the deed. One reason underlying the doctrine is that the law seeks to afford freedom in the barter and sale of real estate. And for that reason it discountenances secret trusts or liens arising by implication which may not only make against the free and untrammelled disposition of real property but may operate as well to entail a considerable charge upon a subsequent grantee, who, though having notice of the right, may not be able to estimate and appreciate the amount for which it exists. The cases therefore assert that where the consideration for the conveyance is the entering into an agreement to do or not to do certain things and the remedy for the breach of such agreement consists in an action for unliquidated damages, the parties will be presumed not to have intended that the land should remain charged with the vendor's lien to secure such unliquidated damages which may never accrue and are unascertainable by third parties dealing with the land.

The doctrine predicates in those circumstances upon the theory that the consideration for the deed in whole or in part is the entering into the covenants by the grantee and that such covenants are a substitute for the price. In other words, it is said that in such circumstances the deed itself discloses the parties intended the covenant should be substituted for the consideration money or other valuable exchange and was therefore in fact the thing bargained for instead of money, property, services or other valuable exchange indicating a value certain of ascertainment.

After an examination of many authorities, we are persuaded the general doctrine on the subject is accurately stated in the 29th Am. and Eng. Ency. Law (2 Ed.), 744, 745, as follows:

“In order that the lien may arise it is fundamental that there should be an ascertained, fixed consideration

either of money or its equivalent whereby there arises a certain, absolute debt of the vendee to the vendor in consideration of the transfer of the land. It does not exist in behalf of any uncertain, contingent, or unliquidated demand. Thus, where the consideration was the performance by the vendee of certain covenants for the breach of which the remedy is an action at law sounding in damages, no lien exists; nor where the consideration was the assumption by the vendee of certain liabilities of the vendor, and those liabilities depended on conditions which afterwards became defeated so that the liability of the vendor has ceased, no lien exists, as the consideration was not the payment by the vendee of a sum certain, but the protection of the vendor against the contingent loss. The consideration cannot be extended to cover collateral obligations or duties. Nor is the lien enforced where the consideration would be an agreement to support the vendor for life, or where the consideration is of such a nature as not to be susceptible of accurate ascertainment as to the amount of the charge to be impressed on land, or the fulfillment of conditions embracing an indefinite period. The impracticability of their enforcement operates the withholding of equitable relief. The cardinal rule deduced from all the cases seems to be that the lien lies only for the debt, which may be either for money or the rendition of service or any other valuable consideration, definite and ascertained, and stipulated as the equivalent of the amount of the purchase price, and arising out of the sale of land against which the lien is sought to be enforced."

To the same effect is 3 Pomeroy's Equity Jur. (3 Ed.), secs. 1251, 1252; Bispham's Equity (6 Ed.), sec. 355; 2 Jones on Liens, sec. 1071; 2 Washburn's Real Property (6 Ed.), sec. 1038; Whiteley v. Central Trust Co., 76 Fed. 74; 2 Sugden on Vendors, 380, 381; Clark v. Royle, 3 Sim. 499; Parrott v. Sweetland, 3 My. & Ke. 655; 1 Perry on Trusts (4 Ed.), sec. 235;

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Brawley v. Catron, 8 Leigh (Va.), 522; Hiscock v. Norton, 42 Mich. 320; McKillip v. McKillip, 8 Barb. (N. Y.), 552; Payne v. Avery, 21 Mich. 524; Gard v. Gard, 108 Cal. 19, s. c. 40 Pac. 1059. See also other authorities cited in the brief.

The doctrine thus stated we believe to be somewhat broader than that which obtains in this State as reflected by our Supreme Court in *Williams v. Crow*, 84 Mo. 298. That case, in its broadest aspect, seems to be at variance with the rule which universally obtains and indeed an enforcement of the full measure of the rule which it seems to portray would impinge established equitable principles which obtain with respect to the vendor's lien. Even though not precisely in point, that case has given us much concern in reaching a conclusion as to the proper disposition of this one. If that case were in point, of course, we would follow it and rule the case in judgment accordingly, for the reason the Constitution of the State commands that this court shall be controlled by the last previous ruling of the Supreme Court on any question of law or equity. The facts in judgment and on which the vendor's lien was sustained in *Williams v. Crow* are similar to the cause now under consideration only in that each case involves a covenant as a basis for the relief sought, otherwise they are entirely dissimilar. In *Williams v. Crow*, the suit was between the immediate parties to the conveyance and the covenant entailed an express obligation upon the grantee as a part of the consideration in the deed to discharge an encumbrance on the estate, if it should be established, or pay money. The encumbrance, having been thereafter established, and the covenant breached by the failure of Crow to discharge his express obligation in respect to the payment of the same, the court sustained a vendor's lien for the amount the grantor was required to pay as though it were consideration money ascertained and certain.

Now the case in judgment here is to be distinguished in two respects, first, the covenant contained in the present deed in no manner imposes an *express* obligation upon the grantee or assigns to *pay* anything in any event. But on the contrary, it is wholly a collateral covenant, though part of the consideration of course, obligating the grantee to the performance of certain designated acts, to-wit, the building of a pass-way and backwater gate. There is not a word contained in the present covenant indicating an express promise on the part of the grantee to pay any money, property, services or other valuable exchange as a part of the price of the land, but instead it became personally bound thereby to erect and maintain the structures referred to *as a substitute for payment*. Besides, it is sought in this suit to enforce this unliquidated covenant against a subsequent grantee, who, although having knowledge of the covenant itself, is, as all must be, entirely ignorant of the uncertain portion of the purchase price, if any, concealed therein. It seems that the Supreme Court in *Williams v. Crow* seized upon the strong equities presented by that case and enforced a vendor's lien which arose out of a violation of the covenant referred to between the immediate parties to the deed. In so doing, no doubt, a just result was had, for it appears that Crow, the grantee, not only agreed to remove the encumbrance as referred to in the opinion in that case as a part of the consideration money but expressly agreed as well to pay the loss entailed by his failure to do so. Through omitting to remove the encumbrance Crow entailed a consequent loss upon the grantor by diminishing the consideration money to that extent and this amount was ascertained and settled in a suit at law on the covenant prior to the proceeding in equity to enforce the vendor's lien. The judgment of the Supreme Court in that case involves the idea that Crow, the grantee, against whom the lien was enforced, had failed to pay

a portion of the consideration according to his *express obligations to pay* in money or relieve his grantor from so doing. In that respect, it conforms to the doctrine maintained throughout all of the cases and the textbooks to the effect that the vendor's lien may be enforced only as an incident to an obligation to pay in money, property, services or some like valuable exchange.

The present case presents no such idea. It expressly appears from the covenants relied upon here that no such an obligation was assumed; nothing therein indicates an express promise to pay money in any event, but on the contrary the obligation vouchsafed therein pertains rather to the performance of independent acts wholly irrespective of the thought that it involves the payment of money, property, or services or other exchange susceptible of certain ascertainment to the end that a subsequent grantee with notice might know the extent of the burden assumed. The covenant relied upon under the rule of all of the authorities is one which is regarded to have been taken as a substitute for the consideration money. In other words, the covenants in this deed clearly disclose an intention to the effect that the grantor bargained for the covenants and not for purchase money, property or other valuable exchange. See authorities *supra*. To sustain this action would result in establishing an anomaly in our jurisprudence touching the matter of vendor's liens and extend the rule of *Williams v. Crow* quite beyond anything forecasted by that case as sound doctrine.

Entertaining these views, it will be unnecessary to consider the arguments contained in the briefs as to the proper measure of damages and the question as to plaintiff's cause of action, if any, being barred by the Statute of Limitations.

The judgment should be affirmed. It is so ordered. All concur.

WILLIAM HEIDBRINK, Respondent, v. L. S. SCHAFFNER et al., Appellants.**St. Louis Court of Appeals, April 5, 1910.**

1. **BUILDING CONTRACTS: Construction.** A building contract providing that the owner, on a certificate by the architect that the contractor has "failed in the performance of any of the agreements which said contract contained," may on three days' notice terminate the contract and complete the work, and that the expense incurred by the owner shall be certified by the architect, whose certificate shall be conclusive, contemplates delays, defaults and controversies of a minor character, arising upon stipulations of the contract but for which the owner might end the employment, if the architect deemed the default grave enough to justify such a step, but does not provide against the contingency of abandonment of the work by the contractor; and where the contractor abandons the work, the owner may complete it without obtaining the architect's certificate.
2. ———: **Stipulation for Certificate of Architect: Condition Precedent.** A building contract stipulating for the certificate of the architect as to whether breaches of the contract have occurred, or whether payments are due under it, requires the party seeking damages for a breach embraced in the stipulation to allege and prove that a certificate was given.
3. ———: ———: ———: **Action for Breach of Contract.** A contractor in a building contract, which stipulated that the owner on obtaining a certificate of the architect might terminate the contract and complete the work, and that the expense incurred by the owner should be audited by the architect, whose certificate should be conclusive, gave a bond conditioned on his performance of the contract. He abandoned the work, and the owner completed it and sued on the bond for the cost of completing the work. *Held*, that the owner need not allege and prove that a certificate had been given as to the expense of completing the work

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

AFFIRMED.

Heidbrink v. Schaffner.

John S. Leahy and Block & Sullivan for appellants.

(1) The demurrers to the evidence offered by appellants should have been sustained. *Dinsmore v. Livingston Co.*, 60 Mo. 244; *Williams v. Railroad*, 112 Mo. 489, S. C. 153 Id. 497; *Chapman v. Railroad*, 114 Mo. 547; *Howard County v. Baker*, 119 Mo. 407; *McGregor v. Construction Co.*, 188 Mo. 623; *Roy v. Boteler*, 40 Mo. App. 222; *Eldridge v. Fuhr*, 59 Mo. App. 49; *International, etc., Co. v. Biefeld*, 173 Ill. 185; 30 Am. and Eng. Ency. of Law (2 Ed.), p. 1264; *O'Keefe v. St. Francis Church*, 59 Conn. 567; *DeMattos v. Jordan*, 15 Wash. 378; *Tally v. Parsons*, 131 Calif. 516; *Scott v. Texas, etc., Co.*, 55 S. W. (Tex. Civ. App.) 38; *American, etc., Co. v. Gibson Co.*, 127 Fed. 671; *New York, etc., Co. v. Springfield, etc., Co.*, 56 App. Div. (N. Y.) 294. (2) The instruction given by the trial court to the jury was erroneous because it authorized a recovery without the production of the architect's certificate required by the contract. Cases cited *supra*.

Kurt Von Reppert for respondent.

(1) The conditions of the bond sued on are paramount to all stipulations in the contract; for it is the general rule, that one incurs the precise liability nominated in the bond, and he can relieve himself by performance of the conditions. The words "unconditionally bound" constitute a waiver of all stipulations in the contract. The covenants in bond to pay, etc., are independent and additional covenants to those mentioned and contained in the contract and stand without limitations upon them. The bond in suit is an "omnibus" bond. *Davis v. Wells Fargo Co.*, 104 U. S. 164; *Kent v. Silver*, 106 Fed. 365; *Harvesting M. Co. v. Laster*, 70 Ill. App. 425, s. c. 81 Ill. App. 316; *Robbins v. Robbins*, 176 Pa. St. 341; *Lionberger v. Krieger*, 88

Mo. 160; Bank v. Trustee, 75 Mo. 199; Boteler v. Roy, 40 Mo. App. 234; Fisher v. Cutter, 20 Mo. 209; Cockran v. Stewart, 63 Mo. 424; Fisse v. Einstein, 5 Mo. App. 78; Martin et al. v. Whites & Cox, 128 Mo. App. 117. (2) The stipulation in article 5: "The expense incurred, etc., by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified to by the architects whose certificate thereof shall be conclusive upon the parties," is not merely a provision in the nature of an appointment of a third party for the purpose of an appraisal or valuation, but also involves and requires the determination of the question as to the measure of damage to be applied in the matter. It is, therefore, in the nature of a provision for arbitration and award. Such a provision, following after the express provision in said article 5, . . . but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner," does not, on arising of a dispute as to whether under the contract certain expenses ought to be taken as an element of damage to the owner, make such an award of arbitration a condition precedent to a right of action. Nor is such a provision for award and arbitration irrevocable. It is revoked by the institution of suit. The two stipulations, *viz.*: The one providing for the contractor to pay the owner such excess, and the other that the expense in finishing the work and damages incurred shall be audited and certified, are distinct and independent stipulations. The stipulation to audit and certify to the expense and damage is collateral. Neither by express stipulation or by the necessary implication is such an award by arbitration made a condition precedent to plaintiff's right of action, nor is such an award a grant of power coupled with an interest, and therefore irrevocable. If such a provision is to be construed to be an irrevocable award, then it is a plain attempt to oust the jurisdic-

tion of the courts to determine the rights of the parties. Such is against public policy and the law. *George A. Fuller Co. v. Doyle*, 87 Fed. 687; *Mfg. Co. v. Locomotive Co.*, 119 Fed. 489; *Hamilton v. Ins. Co.*, 137 U. S. 370, 380, 388, see cases Cent. Dig. No. 30; *Green v. Cotton Co.*, 112 Fed. 743; *Parsons v. Ambros*, 121 Ga. 98; *Lloyd on Building and Builders*, pars. 15, 16, 17, 18; *Preston v. City of Syracuse*, 92 Hun (N. Y.) 301; *Seward v. Rochester*, 109 N. Y. 154; *Canal Co. v. Coal Co.*, 50 N. Y. 250; *Hurst v. Leifield*, 39 N. Y. 377.

GOODE, J.—Defendant Schaffner contracted to erect a house for plaintiff for \$5800 by December 1, 1906. The work on the house progressed to a certain stage until December first, when Schaffner quit work, he testified, because he had no money to pay for labor or material and claiming plaintiff had not paid him the installments of the price as agreed. Schaffner notified plaintiff he would not complete the house and abandoned the contract, so the jury must have found under the instruction about what facts would authorize a verdict for plaintiff. Plaintiff then took charge of the job and completed it, he alleges at a cost above the agreed price of \$1841.22, for which sum he sued Schaffner and the other defendants who were his bondsmen. This notice was sent by Schaffner to plaintiff December first:

“William Heidbrink, Overland Park, Missouri.

“Dear Sir: This is to notify you that as you have failed to make the payments called for by your contract for the erection of store and dwelling, at the southwest corner of Goodale and Lackland avenue, your contract with me is forfeited.

“Respectfully,

“L. S. SCHAFFNER.”

At the date of said notice the building was not nearly finished, though it was to have been finished by

said date. The contract for building the house was in writing and contained this article which is material to the appeal:

“Art. V. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements contained herein, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after three days’ written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included, under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor ——— shall not be entitled to receive any further payment under this contract until said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects,

whose certificate thereof shall be conclusive upon the parties."

The bond on which the present action was filed, reads:

"Know All Men By These Presents: That I, L. S. Schaffner, as principal, and we, T. F. Maloney and Cornelius P. Maloney, as securities, are jointly and severally held, and firmly bound unto Wm. Heidbrink in the sum of five thousand (\$5000) dollars, lawful money of the United States of America, well and truly to be paid to the said Wm. Heidbrink, for which payment well and truly to be made, we bind ourselves, and each of us by himself, our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals and signed with our hands this 8th day of September, in the year of our Lord, nineteen hundred and six.

"The condition of the above obligation is such, that whereas, the said L. S. Schaffner has on the day of the date of these presents, executed and entered into a certain contract for the erection of a certain building in said contract described, which contract is hereto annexed: Now, if the said L. S. Schaffner shall well and truly perform and fulfill all and every the covenants, conditions, stipulations and agreements in said contract mentioned to be performed and fulfilled, and any alterations and additions to said contract, provided such alterations and additions, if any such be made, shall not exceed in extra costs the sum of five hundred dollars (\$500).

"We, the said sureties, hereby expressly waiving all rights to be notified of, or by any further act to give our assent to such alterations and additions and acknowledging ourselves to be bound unconditionally for the faithful performance of said contract and of such alterations and additions within limit of said contract price and of such extra costs aforesaid, and shall keep the said Wm. Heidbrink harmless and indemni-

fied from and against all and every claim, demand, judgments, liens, and mechanic's liens, costs and fees of every description incurred in suits or otherwise, that may be had against him or against the building to be erected under said contract, including such alterations and additions, and shall repay the said Wm. Heidbrink all sums of money which he may pay to other persons on account of work done and labor or materials furnished on or for said building, and if the said L. S. Schaffner shall pay to the said Wm. Heidbrink all damages he may sustain, and all forfeitures to which he may be entitled by reason of the non-performance or malperformance on the part of said L. S. Schaffner of any of the covenants, conditions, stipulations and agreements of said contract, including such alterations and additions, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

"Witness our hands and seals.

"L. S. SCHAFFNER (Seal),

"TIMOTHY MALONEY (Seal),

"CORNELIUS P. MALONEY (Seal)."

Plaintiff had judgment for the penalty of the bond, his damages being assessed at \$750, with interest at six per cent from March 12, 1907, to the date of the verdict, March 8, 1909, and also for one hundred dollars as damages for a separate breach stated in the petition, of the covenant in the contract to complete the house by December 1, 1906, in consequence of which breach plaintiff lost the rent of the premises for two months. The contention is plaintiff cannot recover on the bond because the architect under whose supervision the house was to be erected, gave no certificate, as required by article V of the contract, of the expense incurred by plaintiff in completing the work or damages suffered through the delay or default of the contractor in not finishing the job, and gave no certificate authorizing plaintiff to complete the work as provided in said article. To these contentions plain-

tiff replied the bond bound the defendants unconditionally to pay damages in case there was a default on the part of Schaffner in compliance with the contract. Further, that the defense of want of a certificate by the architect certifying Schaffner had neglected, failed and refused to comply with his undertaking and regarding the expense incurred by plaintiff in completing the work, was not set up in the answer, which was only a general denial, and such a defense cannot be brought into a case except by pleading it specially in bar; further, that the defense based on want of certificates of the architect regarding the items sued for was waived by permitting evidence to go in without objection to prove the reasonable value of the material and work paid for in consequence of the contractor's default and joining issue on the question of their value. Article III of the contract said no alteration should be made in the work except on the written order of the architect, and the amount to be paid by the owner or allowed by the contractor should be stated in the order; if the owner and contractor could not agree as to the amount, the matter should be arbitrated, as provided for in article XII. Article VII provided for an extension of time to complete the building if the contractor was delayed by fault of the owner or architect or other enumerated causes. Article VIII said the owner should furnish all labor and material essential to the work and not included in the contract, so as not to delay its completion, and if he failed to do this and thereby caused loss to the contractor, he should reimburse the latter for the loss and in case the two disagreed as to the amount, it should be arbitrated. Article IX provided for payments of installments on the price of the house when certain stages of its progress toward completion were certified to by the architect. Article X said no payment or certificate of the architect made or given under the contract, except the final payment or certificate,

should be conclusive evidence of the performance of the contract in whole or in part, and no payment should be construed as an acceptance of defective work or improper materials. Article XII provided for arbitration of disputes arising over matters contained in articles III, VII and VIII; but said nothing about the arbitration of any other controversies. Such are the provisions of the contract which throw light on the powers of the architect or the function of certificates issued by him, and it will be perceived none of the articles except the fifth has a bearing on the present controversy. We have referred to article XII and its provision for the arbitration of certain disagreements because plaintiff contends that to give article V the construction defendants insist upon, would make it provide for submitting to the arbitration of the architect, disputes over matters mentioned in article V, and this construction would render it void, as it would oust the jurisdiction of the courts. We merely observe in this connection that article V cannot be construed to mean controversies over the matters dealt with in it should be arbitrated by the architect; the contract provides for the arbitration of no controversies except those referred to in article XII. We sustain the judgment below for a different reason. It is clear to our minds article V did not contemplate renunciation of the contract by the contractor or provide what should be done if he renounced it and abandoned work on the building before it was completed. The first part of the article relates to the possible failure of the contractor either to supply sufficient skilled workmen and sufficient material of the proper quality or to prosecute the work with promptness and diligence in any respect, or perform any of the agreements contained in the contract. If either of those defaults in his obligation happened, then, after the default had been certified by the architect, plaintiff was at liberty to provide labor or material and deduct the cost of it from money due the

contractor, first giving the latter three days' notice. It may be argued plausibly that those clauses, and particularly the words "fail in the performance of any of the agreements herein contained," are broad enough to cover an abandonment of the job by the contractor. The word "agreements" is against this view, and rather suggests the phrase just quoted contemplated non-performance of any stipulation in the contract, instead of a renunciation of the contract as a whole, and that "agreements" was used as the synonym of "stipulations." Anyhow those first clauses of the article must be read in connection with the remainder, and when so read it is plain the contingency of abandonment by the contractor was not provided against. The article goes on to say, in effect, that if the architect should certify the contractor had refused, neglected or failed to perform in any respect previously mentioned, and that the default was sufficient ground for the owner to terminate the employment, then the owner would be at liberty to terminate it and take possession of the premises for the purpose of completing the work. Said provision was written in language which will not bear the meaning that it was applicable when the contractor himself had terminated the employment; for it declared the owner might do this on receipt of a certificate from the architect that the conduct of the contractor had given cause to dismiss him. Besides, if the contractor renounced the contract, there would be no occasion for the certificate of the architect, and the owner could not terminate the employment as it would have been terminated already by the contractor. It is palpable, therefore, that article V contemplated delays, defaults, differences of opinion and controversies of a minor character arising upon stipulations of the contract, but for which the owner might end the employment if the architect deemed the defaults grave enough to justify such a step. Other-

wise expressed, both parties agreed to abide by the decision of the architect as to when Schaffner had been guilty of breaches of the contract that were ground for the owner to take charge of the work and complete it; but did not agree the architect should certify to a renunciation by the contractor of his obligation in its entirety, as the condition on which plaintiff might take charge and furnish labor and material to complete the house, if Schaffner renounced his task. In the argument for defendants, the chief emphasis is laid on the last clause of article V which said the architect's certificate should conclude the parties regarding the expense plaintiff might incur in furnishing material and finishing the work, and the damages he might suffer through the contractor's default. But this clause has reference to the previous clauses of the contract; for it opens by saying the "expense incurred by the owner *as herein provided*," etc.; that is to say, expense plaintiff might incur if Schaffner should delay the work, or otherwise default in the performance of his contract, to such a degree as to induce the architect to certify the default was ground for plaintiff's terminating the employment and completing the house; a contingency that never arose, because, though Schaffner fell far behind in the performance of his contract and the house was not nearly complete by the day it was to be turned over to plaintiff, which was the very day Schaffner renounced the contract, his defaults had been tolerated until then, and neither plaintiff nor the architect had interfered with him. We accede to the proposition asserted by counsel for defendants that a stipulation for the certificate of an architect about whether breaches of a contract have occurred or payments are due under it, or any like matter, requires the party who seeks damages for a breach embraced in the stipulation, to allege and prove a certificate was given. [Williams v. Railroad, 112 Mo. 463, 486; 153 Mo. 497, 20 S. W. 631; Roy v. Boteler, 40 Mo. App. 213; El-

dridge v. Fuhr, 59 Mo. App. 44, 53.] But this action is not for such a breach of contract; is not on the contract at all, but on the bond given by defendants to secure its faithful performance; and it will be observed the bond contains ample, though incoherent, terms of obligation. Of course it bound Schaffner to perform instead of renounce the contract, and this action is really to obtain damages entailed by his renunciation; a matter of which, as pointed out, the contract says nothing. Hence we hold plaintiff was not called upon to allege and prove a certificate had been given by the architect as to the expense plaintiff had incurred for material and labor in finishing the house after Schaffner had quit the job. This conclusion was announced in a case on an identical bond and contract in Fuller v. Doyle, 87 Fed. 687, 692. The same result would prevail according to the authority just cited, from defendants having joined issue regarding the reasonable cost of the completion of the house by plaintiff, instead of pleading in defense to plaintiff's action on the bond, that the last clause of article V of the contract provided the only method of ascertaining the expense. But we regard that view as inconsistent with the construction of article V already given and which we consider the right view of its meaning. If the gravamen of this case fell within the terms of article V, then, possibly, as the case is on the bond, it would be matter of defense that the mode of measuring the cost provided in said article was not followed. We have read all the cases cited in the brief for defendants in support of their position, and find they are out of point for one of two reasons, either because the contract had not been renounced by the contractor, but only defaults had occurred to warrant a certificate from the architect under the terms of article V supra, as was the fact in International, etc., Co. v. Biefeld, 173 Ill. 185, and O'Keefe v. St. Francis Church, 59 Conn. 567; or, if there had been a renunciation of the

contract, that document called for a certificate from the architect in such a contingency before the owner was empowered to complete the work. [De Mattos v. Jordan, 15 Wash. 378; Am., etc., Co. v. Gibson County, 127 Fed. 671; Tally v. Parsons, 131 Calif. 516.]

The judgment is affirmed. All concur.

M. J. FERNANDEZ, Appellant, v. CHARLES
LAMOTHE et al., Respondents.

St. Louis Court of Appeals, April 5, 1910.

1. **FRAUDULENT CONVEYANCES: Creditor at Large: Suit Against Persons Aiding Debtor: Action Will Not Lie, when.** The current of decision is adverse to allowing an action against parties who have assisted a debtor in shuffling his property to defeat an execution, in favor of creditors at large, or perhaps any creditor, save one who holds a judgment lien or other lien on the property fraudulently disposed of by conveyance, removal or otherwise.
2. ———: ———: ———: **Pleading.** In her petition, plaintiff **Against Persons Aiding Debtor: Action Will Not Lie, When.** plaintiff was to sell defendant's interest in a tract of timber; that she secured the other defendants as purchasers of the property and that a contract was made under which the property was to be transferred to said other defendants, and that her commission was a stated amount, which had never been paid; that subsequently all of the defendants conspired to cheat plaintiff out of her commission and rescinded the contract made by them and formed a corporation, to which defendant LaMothe transferred his property, in pursuance of said conspiracy and with the fraudulent purpose to enable said defendant LaMothe to conceal or dispose of his property and thus hinder, delay and prevent plaintiff from collecting her just demands against him. Plaintiff asked judgment against defendants for the amount of her commission. *Held*, that the petition contains two distinct causes of action, one against only part of the defendants, and the other against all of them, which is forbidden by section 593, Revised Statutes 1899, although sometimes allowed in equity; that it fails to state a cause of action for a violation of section 1931, Revised Stat-

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utes 1899, if an action would lie on that section, as it is not alleged any of the defendants put in use the transfer by defendant LaMothe to the company as having been made in good faith; and that as no judgment was asked against defendant LaMothe for the debt he is said to owe, a demurrer to the petition should be sustained.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. H. Williams*, Judge.

AFFIRMED.

Julian Laughlin for appellant.

(1) The petition states a cause of action against the defendant LaMothe, and the damage is a definite sum, \$2632. (2) When the plaintiff has a well defined cause of action against one of the defendants, she may join with LaMothe anyone who knowingly and wrongfully aided and assisted LaMothe in accomplishing the act which caused the damage to plaintiff. (3) The act complained of is forbidden by the laws of Missouri, and is an unlawful act. Sec. 1931, R. S. 1899. (4) "A conspiracy to do an illegal thing is actionable, if injury proceed from it." *Halderman v. Martin*, 10 Barr, 372. (5) "In a civil action on the case for conspiracy, the gist of the action is the damage which the plaintiff has sustained by the acts of the defendants, and the allegation of a conspiracy need not be proved." *Hunt v. Simonds*, 19 Mo. 588; *Holborn v. Naughton*, 60 Mo. App. 101. (6) "Fraudulent collusion may be inferred from facts and circumstances not consistent with an honest purpose." *Schultz v. Christman*, 9 Mo. App. 588. "Persons conspiring together by their false and fraudulent representations, causing lands to be sold at a sacrifice, will be liable in damages for the injury done." *Wickersham v. Johnson*, 51 Mo. 313.

Jos. Barton for respondents.

(1) Appellant's amended petition is fatally defective. This is apparent upon its face. To declare that certain acts constitute and actionable conspiracy, is not sufficient. (2) This is an action on the case for damages, alleged to have been occasioned by an unlawful conspiracy. In a criminal sense, the gist of the offense lies in the unlawful combination to do an unlawful act, regardless of whether the particular act was accomplished or not. In the civil sense, the conspiracy or combination is nothing, so far as sustaining the action goes, and the allegation that a conspiracy was formed, need not be proved. The gist of the action is the damage alleged to have been done to the plaintiff. 6 Am. and Eng. Ency. Law, 872, 873, 874; *Hutchins v. Hutchins*, 7 Hill (N. Y.) 107; *Wellington v. Small*, 3 Cush. (Mass.) 145; *Doremus v. Hennessy*, 62 Ill. App. 391. Appellant, therefore, does not state a case by merely alleging that there was a conspiracy or combination to do an injurious act. *Adler v. Fenton*, 24 How. (U. S.) 407.

STATEMENT.—Final judgment was rendered upon a demurrer to the petition which we transcribe:

“Now comes the plaintiff in the above entitled cause, and, by leave of court first had and contained, files this her amended petition and states that she is engaged in the business or occupation of selling timber lands for others on commission; that on or about the 10th day of October, 1907, she was employed by the defendant, Charles L. LaMothe, to sell, trade or exchange his interest in a timber lease on a tract of about 4700 acres of growing timber or timber stumpage in Pemiscot county, Missouri, giving her exclusive handling of said tract, being parts or all of sections 1, 2, 3, 4, 9, 10, 11, 15, 33, 34 and 35 in township 19 north, ranges 11 and 12 east, known as the ‘Byrd & McComb

Lands,' including a sawmill and all machinery used in connection with the same; that defendant, Charles L. LaMothe, agreed to pay plaintiff as commission for making such sale, trade or exchange, the sum of \$2623, which was the agreed price of 56 cents per acre on the entire tract of 4700 acres; that agreeable to such employment, plaintiff advertised said property and corresponded with others and found customers in Allegheny and Pittsburg, Pennsylvania, in the persons of defendants A. F. Schwerd and Hugh Murphy, who were willing to exchange Allegheny county real estate owned by them for the property of said defendant LaMothe above described; that said defendants Schwerd and Murphy, after an examination of the timber and mill of said defendant LaMothe were satisfied with the same, and on or about the 10th day of June, 1908, the defendant LaMothe and his co-defendants, Murphy and Schwerd, entered into a written contract, whereby said LaMothe agreed to exchange the property above described for 54 lots of ground in the county of Allegheny, Pennsylvania, owned by said Schwerd and Murphy, the value of the property to be transferred by each of the respective parties being agreed upon as \$40,000. That on the execution of said contract as aforesaid, plaintiff's work was completed, and the said defendant, Charles L. LaMothe, became indebted to plaintiff in the said sum of \$2632, as commissions for her services in effecting such exchange, and that no part of the same has been paid to plaintiff, though often demanded.

"Plaintiff further states that thereafter said defendant Charles L. LaMothe, entered into an agreement, combination and conspiracy with his co-defendants, Hugh Murphy and A. F. Schwerd, for the sole purpose of cheating and defrauding the plaintiff out of said commissions so earned as aforesaid by her from said Charles L. LaMothe, and in pursuance of said agreement, combination and conspiracy and with

full knowledge of all the facts and with the sole purpose of cheating and defrauding the plaintiff, said defendants agreed among themselves to rescind or abandon said written contract above described, and did rescind, abandon and hold for naught said written contract, and did, thereupon, in pursuance of said conspiracy, combination and agreement and for the further fraudulent purpose of enabling the said Charles L. LaMothe to speedily and easily conceal or dispose of his property and effects and thus hinder, delay and prevent the plaintiff from collecting her just demands against him, said defendants did, on the——day of——, 1908, cause all the right, title and interest of the said Charles L. LaMothe in and to said timber and saw-mill, etc., to be transferred to the defendant, Wardell Land & Lumber Company, which had been formed and incorporated under the laws of the State of Missouri by said defendants, LaMothe, Schwerd and Murphy; that said Wardell Land & Lumber Company was organized and incorporated for the sole purpose of aiding said defendant Charles L. LaMothe, to conceal his property and assets and prevent the realization of any judgment the plaintiff might obtain against him. And in pursuance of said purpose said defendant Charles L. LaMothe, has been enabled to and has disposed of his interest in said company, or all except a nominal portion thereof, and although the property owned by the said Charles L. LaMothe, who was at the time of the execution of the written contract for exchange hereinbefore mentioned, seized and possessed of tangible assets subject to execution of not less than \$40,000 in value, yet, by reason of the wrongful and fraudulent acts above complained of and by reason of the assistance, aid, connivance and procurement of his co-defendants, Schwerd and Murphy, in pursuance of said unlawful agreement, combination and conspiracy, as above set forth, said Charles L. LaMothe, has secreted, concealed and disposed of all his

said property, for the purpose of cheating and defrauding this plaintiff and rendering valueless any judgment which she might obtain against him, to plaintiff's damage in the sum of \$2632. Wherefore plaintiff asks judgment against said defendants in the said sum of \$2632, with interest thereon from said 10th day of June, 1908, and for costs."

GOODE, J. (after stating the facts).—Appellant appears in the petition as a creditor at large of defendant LaMothe without either a judgment against said defendant or a lien on his property. Cases are in the books, mostly in the Pennsylvania Reports, wherein actions by such creditors against parties alleged to have assisted debtors in shuffling their property to defeat executions, were sustained. [Mott v. Danforth, 6 Watts 304; Penrod v. Mitchell, 8 Sarg. & Rawl. 522; Kelsey v. Murphy, 26 Pa. St. 78; Merchants', etc., Bank v. Tinker, 158 Pa. St. 17; Meredith v. Benning, 1 Hen. & Munf. (Va.) *585.] In these cases usually a conspiracy is alleged between the debtors and the parties who assisted him in the fraudulent scheme, but the gist of the cause of action is the damage to the creditors by the fraudulent transfer or concealment of the property, and not the conspiracy. [1 Cooley, Torts (3 Ed.), 210.] The current of decision runs against allowing the remedy to creditors at large, or perhaps to any creditor save one who holds a judgment lien or other lien on the property fraudulently disposed of by conveyance, removal or otherwise. [Adler v. Fenton, 24 How. 407; Findlay v. McAllister, 113 U. S. 104; Field v. Siegal, 99 Wis. 605; annotated 47 L. R. A. 433; Lamb v. Stone, 11 Pick. 527; Gardner v. Sherrod, 9 N. C. 173, and many other cases cited in said note to Field v. Siegal; 6 Ency. Law (2 Ed.), 878, 8 Cyc. 648.] It is certain judicial authority preponderates in favor of withholding the remedy where there is neither a judgment establishing the demand, nor a lien on the debtor's prop-

erty. In most of the opinions denying the remedy where there is no judgment or subsisting lien in favor of the creditor, the courts have proceeded on the theory that the conspiracy and fraudulent acts done to make it effectual are so remotely related to the damages alleged to have followed as to render it unsafe for the law to accept such conduct as a basis of recovery. [Bump, *Fraudulent Conveyances* (4 Ed.), sec. 528; *Tasker v. Moss*, 82 Ind. 63; *Lamb v. Stone*, supra.] This reasoning is vague, but understood in connection with the facts of the cases where it has been adopted, it seems to mean the courts think damages might be recovered though, in the nature of things, it is impossible to prove with requisite certainty the creditor would have been able to collect his alleged demand from the property fraudulently disposed of if there had been no such disposition of it, or that he was prevented by the fraud from reaching the property of the debtor sufficient to satisfy his claim. Another argument is the one adverted to in *Lamb v. Stone*, based on the practical inconvenience of the remedy and the chance of its working injustice to other creditors of the debtor than the one who files the first action. It is said the creditor who first proceeds against the parties supposed to have assisted the debtor in a scheme to defraud his creditors would have done nothing to entitle him to priority, if, perchance, the property conveyed was not more than enough to satisfy his demand, and yet there would be no method of apportioning its value among other creditors. We appreciate more the inconvenience of trying in such an action the validity of the creditor's demand against the debtor, a question in which the parties alleged to have conspired with the latter would have only a contingent interest, and trying, too, the question of a fraudulent transfer in which all the defendants would be directly interested. Closely scrutinized the petitions in this case and others like it contain two distinct causes of

action, the first of which is against only part of the defendants and the second against them all; a form of pleading forbidden by the code, but sometimes allowed in suits in equity. [R. S. 1899, section 593, and cases cited, p. 621, 1 Mo. Ann. Stat.]

So much for the case attempted to be stated upon general principles. Even if a creditor at large was entitled to the action, facts are not well pleaded in the present petition to state a case. To organize the Wardell Land & Lumber Company was, of course, a perfectly legal act, as was also the rescission by the individual defendants, LaMothe, Murphy and Schwerd, of the contract by which the former had sold to the two latter his timber and mill. The tortious act, if any there was, consisted in the subsequent conveyance of the property to the Land & Lumber Company for the purpose of preventing plaintiff from collecting the debt LaMothe owed her. After the rescission of the contract of sale, the title to the timber and mill stood in LaMothe alone, and he had full power to convey them to the company without the consent or assistance of Murphy or Schwerd. Hence we do not perceive how the averment that defendants caused all the right, title and interest of LaMothe in the timber and mill to be transferred to the company could be true, or how Schwerd and Murphy could have aided in the transfer so as to constitute them participants in the fraud of LaMothe, if a fraud was intended by him. What they could do to effect the transfer to the company that LaMothe was unable to do without their assistance is neither shown by averments nor obvious in itself.

Counsel for appellant cites us to the statute which says every person, who, being a party to the sale and delivery of any goods or chattels, or to any conveyance or assignment of any estate or interest in real estate, goods, chattels, etc., made or created with intent to defraud prior or subsequent purchasers, or to hinder,

delay or defraud creditors or other persons, and every person privy to or knowing of such conveyance, assignment or charge, who shall willingly put the same in use, as having been made in good faith, shall, upon conviction be adjudged guilty of a misdemeanor. [R. S. 1899, sec. 1931.] It is argued a civil action for damages will lie for a violation of that section; but the averments of the petition do not suffice to state a case on the section if we grant one will lie. It is not alleged, expressly or by necessary implication, any of the defendants put in use the transfer by LaMothe to the company as having been made in good faith. From neither statutory nor common law point of view is a cause of action stated against all the defendants, and plaintiff asks no judgment against LaMothe for the debt he is said to owe.

The judgment is affirmed. All concur.

CHARLES SCHOLL, Administrator of CHARLES
HOEFLE, Deceased, Respondent, v. WILLIAM
GRAYSON, JR., Appellant.

St. Louis Court of Appeals, April 5, 1910.

1. **NEGLIGENCE: Personal Injuries: Damages: Duty of Person Injured to Oblviate Bad Results: Selection of Physician.** The duty of a party injured by the tort of another to use reasonable care to obviate as far as possible the results from the injury extends no further, in the matter of selecting a physician to treat the injury, than to select one of good repute, and for lack of care and skill shown by such a physician in his treatment, the patient is not answerable, nor is the circumstance admissible to mitigate the damages for which the tortfeasor is liable.
2. ———: ———: ———: ———: ———: **Petition in Other Action: Evidence.** In an action for personal injuries, a petition filed by the injured party against his physician and offered in evidence as an admission was properly excluded as tending to establish no fact favorable to defendant.

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3. ———: ———: Pleading: Hospital Bills: Evidence Received Without Objection. In an action for personal injuries, while it would be better to enumerate, among the claims for damages, a hospital bill, if the amount of one is expected to be recovered, it is not error to let the jury include the item in their award, if evidence of payment of such a bill is received without objection.
4. APPELLATE PRACTICE: Harmless Error. Any error in allowing a physician to state the amount of his bill was harmless, where a greater sum had been remitted by plaintiff from the verdict recovered.
5. DAMAGES: Pleading: Loss of Time and Loss of Earnings. An averment of "loss of time," in a petition for negligent injuries, is the same in legal effect as an averment of "loss of earnings."
6. ———: ———: ———: Permanent Injuries. An allegation of "permanent injuries" is not equivalent to alleging loss of time or of earnings.
7. ———: ———: ———: Future Earnings. "Future loss of earnings" signifies diminution of earning capacity in the future and may be shown without a special averment.
8. ———: ———: ———: ———: Absence of Averment Non-Prejudicial: Appellate Practice. In an action for personal injuries, where evidence was received without objection, tending to prove the injured person was, and where it was plain he was, so disabled that diminution of earnings in the future was certain, defendant was not prejudiced by lack of a specific averment of loss of future earnings, and an assignment of error based on allowing a recovery therefor in the absence of such an averment will be overruled, under section 865, Revised Statutes 1899.
9. ———: Evidence of Obligation Incurred Under Allegation of Obligation Paid: Failure to Object. Where evidence of the incurring of bills is offered under a petition which avers payment of them, the evidence is incompetent against an objection; but, if received without objection, it may be referred to the jury.
10. NEGLIGENCE: Automobiles: Evidence: Speed Expert, Competency of. A person who had had considerable experience observing the speed of automobiles, had attended races, ridden every day, read speedometers, had been employed by a rubber company in its repair department for years, which company left to his judgment all matters based on speed, was competent to testify as to the distance in which an automobile could have been stopped; he being an eyewitness to the accident.

11. ———: ———: **Personal Injuries: Evidence: Distance in which Automobile can be Stopped: Relevancy.** In an action for injuries from being struck by an automobile, where contributory negligence of the injured party was charged, in passing hurriedly from the sidewalk into the street near the automobile and so near that it was impossible to stop it in time to avoid the accident, and evidence in support of this defense was offered, it was proper to permit plaintiff to prove the possibility of stopping the machine after the dangerous position of the injured person should have been seen; not as a basis of recovery, inasmuch as that theory was not counted on in the petition, but to overcome the defense.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

AFFIRMED.

Watts, Williams & Dines and *William R. Gentry* for appellant.

(1) The court erred in admitting improper evidence offered by the plaintiff over the defendant's objection. *Coont v. Railroad*, 115 Mo. 669; *Edwards v. Railroad*, 79 Mo. App. 257; *Mellor v. Railroad*, 105 Mo. 455; *Prior v. Railroad*, 85 Mo. App. 367. (a) The court erred in permitting the witness Hefernan to testify as to the distance within which the defendant's automobile could have been stopped on the occasion in question, because the testimony of this witness showed that he did not have sufficient familiarity with the machine and with the facts, nor had he any practical experience or skill to be competent to testify as an expert and give testimony that was of any value. *Igo v. Railroad*, 38 Mo. App. 377; *Gourley v. Railroad*, 35 Mo. App. 87; *Railroad v. Railroad*, 3 Allen 142; *Grinnell v. Railroad*, 73 Ia. 93; *Mammerberg v. Railroad*, 62 Mo. App. 563; *Lynch v. Railroad*, 208 Mo. 1. (b) The court erred in admitting the testimony of Swingley, on cross-examination by plaintiff's counsel, as to the distance within which the automobile could have been stopped on the occasion in question.

The evidence on this subject will be found on pages 28 and 29 of appellant's abstract of record. This evidence was objectionable and should have been excluded on the ground that it injected into the case an element of negligence not stated in the petition. *Trigg v. Lumber Co.*, 187 Mo. 227; *McMenamee v. Railroad*, 135 Mo. 450; *Gurley v. Railroad*, 93 Mo. 450; *Beave v. St. Louis Transit Co.*, 111 S. W. 52. (c) The court erred in permitting the witness Dr. Raithel, called by the plaintiff, to testify as to the amount of his bill which he had against the plaintiff. The doctor was asked how much his bill was. The question to the physician should have been "what is the reasonable value of the services which you rendered the plaintiff?" *Fleming v. Railroad*, 89 Mo. App. 129; *Gumb v. Railroad*, 114 N. Y. 411; *Golder v. Lund*, 50 Neb. 867; *Hewitt v. Eisenhart*, 36 Neb. 794; *Friend v. Ingersoll*, 39 Neb. 717; *Railroad v. Campbell*, 76 Tex. 174; 4 *Sutherland on Damages* (3 Ed.), p. 3639. (2) The court erred in excluding proper evidence offered by the defendant. Defendant offered in evidence a petition filed by the plaintiff in a suit in which he had sued Dr. William F. Kier for damages for malpractice, and in that petition he charged that the negligence of Dr. Kier caused him to suffer many of the very same things which he is complaining in this case he was caused to suffer by the negligence of this defendant. The petition was, therefore, admissible as an admission by the plaintiff against his own interest in this, to-wit: that while he now avers the damages he suffers are the result of the negligence of defendant Grayson, in another case, in the petition filed therein, which was offered in evidence, he admitted that these same damages resulted to him, not from the negligence of this defendant, but from the negligence of Dr. Kier, who treated his injuries. (3) The court erred in giving improper instructions at the request of the plaintiff. Instruction No. 7, given by the court at the request of the plaintiff, is clearly

erroneous. The vice of this instruction is that it permits the plaintiff to recover for an element of damages not pleaded in the petition. (4) Strictly construed, the petition does not charge any loss of earnings whether past, present or future. Plaintiff really was not entitled, under the allegations of the petition, to any compensation whatever for loss of earnings. Merely alleging inability to follow his usual vocation or other ordinary labor is not equivalent to alleging loss of earnings. *Mellor v. Railroad*, 105 Mo. 455; *Slaughter v. Railroad*, 116 Mo. 269; *Mellor v. Railroad*, 105 Mo. 455; *Coontz v. Railroad*, 115 Mo. 669; *Pinney v. Berry*, 61 Mo. 366; *Railroad v. Flood*, 70 S. W. Rep. 331; *Gibler v. Railroad*, 203 Mo. 208; *Minster v. Railroad*, 53 Mo. App. 276; *Morris v. Railroad*, 144 Mo. 500; *Moellman v. Lumber Co.*, 134 Mo. App. 485; *Madison v. Railroad*, 60 Mo. App. 599; *Norton v. Railroad*, 40 Mo. App. 642; *Nelson v. Railroad*, 113 Mo. App. 659; *Duke v. Railroad*, 99 Mo. 349; *Smith v. Railroad*, 108 Mo. 243; *Robertson v. Railroad*, 152 Mo. 382; *Waldopfel v. Transit Co.*, 102 Mo. App. 529; *Rhodes v. Nevada*, 47 Mo. App. 499; *Pentenoy v. Transit Co.*, 108 Mo. App. 681; *Edwards v. Railroad*, 79 Mo. App. 257. (a) The instruction on the measure of damages was further erroneous because it is at variance with the allegations of the petition relating to the same subject. The charge in the petition is not that the plaintiff has been compelled to incur large sums of money for medical and surgical attention, etc., but it is that he has been compelled to expend large sums of money for those items. *Muth v. Railroad*, 87 Mo. App. 422; *Railroad v. Reasor*, 68 S. W. (Tex.) 332.

R. F. Walker and Edward A. Raithel for respondent.

(1) The first instruction given by the court correctly states the law. *Groom v. Kavanagh*, 97 Mo. App. 370; *Scott v. Winineshiek Co.*, 3 N. W. 626, 52 Ia. 626;

Petersborough v. Lancaster, 14 N. H. 382. Defendant cannot be injured by testimony relative to an element of damages, for which the courts hold defendant liable. Eberly v. Railroad, 96 Mo. App. 370; Curtis v. McNair, 173 Mo. 290; Stotler v. Railroad, 200 Mo. 107; Murray v. Railroad, 101 Mo. 236; Mirrieles v. Railroad, 163 Mo. 470; Abbitt v. Transit Co., 104 Mo. App. 534. Facts necessarily implied from those alleged need not be pleaded. Bliss on Code Pleading (2 Ed.), sec. 176; Brown v. Railroad, 99 Mo. 318; 1 McQuillin's Pl. and Pr., sec. 305, p. 293. (a) The ruling of the court in permitting the witness Heffernan to testify as to the "space within which a machine of this character can be stopped" was correct. Defendant's theory is that one must be familiar through practical experience obtained by actual contact with the particular machine in controversy, before being qualified to give an opinion on the matter. This, however, is not the law. Cobb v. Railroad, 149 Mo. 609. Persons familiar with the subject are competent to testify as to the distance within which a train of cars may be stopped; and this knowledge may be obtained by practice or observation. Eckert v. Railroad, 13 Mo. App. 352; Haworth v. Railroad, 94 Mo. App. 215; Fisher v. Packing Co., 77 Mo. App. 108; Turner v. Haar, 114 Mo. 335; Goines v. Railroad, 47 Mo. App. 173; Helfenstein v. Medart, 136 Mo. 595. The decision of the court with reference to expert testimony, is conclusive, unless it appears from the evidence to have been erroneous or founded on an error of law. Benjamin v. Railroad, 50 Mo. App. 602; Bradford v. Railroad, 64 Mo. App. 475; Hartman v. Muehlebach, 64 Mo. App. 565. Even though Heffernan was not an expert, it has been repeatedly held by the courts in this State that the velocity of a car in motion or a train in motion, propelled by electric or steam power, does not have to be established by the testimony of experts; any one accustomed to riding on cars and

seeing them run is a competent witness as to their speed. *Walsh v. Railroad*, 102 Mo. 582; *Covell v. Railroad*, 82 Mo. App. 180; *Lehigh, etc., Co. v. Raine*, 112 Fed. 485; *Detroit, etc., v. Van Steinburg*, 17 Mich. 99; *Guggenheim v. Railroad*, 66 Mich. 150; *Thomas v. Railroad*, 86 Mich. 496; *Railroad v. Jones*, 108 Ind. 551; *Aston v. Transit Co.*, 105 Mo. App. 230; *Stotler v. Railroad*, 200 Mo. 123. (b) 'The petition alleges that the automobile was "negligently and carelessly operated by defendant at a high and dangerous rate of speed, etc.," and therefore the purpose of all the testimony elicited by plaintiff's counsel as to the distance within which the automobile could have been stopped was to strengthen the showing of the rate of speed at which it was traveling. This applies as well to the defendant's witness Swingley as to witness Heffernan. (c) There was no error on the part of the trial court in permitting the witness, Dr. Raithel, to testify as to the amount of his bill for services rendered to the plaintiff. Even though the testimony of this witness be excluded, there is still ample evidence on this point in the testimony of Dr. Schlueter to definitely fix the amount of medical services. The instruction No. 7, therefore, given at the request of the plaintiff "for any expenses necessarily incurred for medical or surgical attention to the reasonable value thereof. . . ." properly places this question before the jury and it could not have been misled by the testimony of this witness. *Mirrieles v. Railroad*, 163 Mo. 492; *Smith v. Railroad*, 108 Mo. 251; *Robertson v. Railroad*, 152 Mo. 393; *Stevenson v. Wallpole*, 76 Mo. App. 1. c. 224; *Fleming v. Railroad*, 89 Mo. App. 139. As to the other ground of exception in sub-section D of appellant's brief, the evidence of this item is amply sustained by the proof of plaintiff and the two doctors, who testified without objection by the defense. *Stotler v. Railroad*, 200 Mo. 140. The direct consequence of a wrongful act either expected

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or unexpected, following as a natural result of the wrongful act has always been the subject of compensation and need not be specially pleaded. *Trust Co. v. Murmann*, 90 Mo. App. 555; *Golden v. Clinton*, 54 Mo. App. 118; *Bliss on Code Pleading*, sec. 297; *Chitty on Code Pleading* (14 Am. Ed.), pp. 395-6. Plaintiff is entitled to recover for obligations incurred for medical treatment as well as for sums expended therefor. *Curtis v. McNair*, 173 Mo. 291; *Mirrielees v. Railroad*, 163 Mo. 470; *Schmitz v. Railroad*, 119 Mo. 277; *Rosenkranz v. Railroad*, 108 Mo. 9; *Stotler v. Railroad*, 200 Mo. 107. (2) A person injured by the negligence of another, is bound to use ordinary care for his restoration and cure; but is not responsible for the mistake of an attending physician. If he acts in good faith under his direction, any mistake of the physician in treating him will not absolve the party whose negligence caused the injury, from liability in damages therefor. *Elliott v. Kansas City*, 174 Mo. 554. (3) The petition alleges among other things, "that the injury is permanent; and that plaintiff was and is prevented from pursuing his regular vocation as collector and chief wagon driver or any other labor or calling." This, we respectfully submit, is broad enough to permit the giving of the instruction above referred to. *Hansberger v. Railroad*, 82 Mo. App. 578; *Bigelow v. Railroad*, 48 Mo. App. 373; *Bartley v. Trorlicht*, 49 Mo. App. 218; *Mabrey v. Railroad*, 92 Mo. App. 596; *Welsh v. McAllister*, 15 Mo. App. 492; *Lewis v. Independence*, 54 Mo. App. 183; *Schmitz v. Railroad*, 119 Mo. 256 and authorities; *Holden v. Railroad*, 108 Mo. App. 672; *Wilbur v. Railroad*, 110 Mo. App. 689; *Britton v. City of St. Louis*, 120 Mo. 437; *Curtis v. McNair*, 173 Mo. 290; *Gorham v. Railroad*, 113 Mo. 421; *Rosenkranz v. Railroad*, 108 Mo. 9; *Stokes v. Ralpho T'p*, 40 Atl. 958, 962, 187 Pa. 333; *Beach v. Railroad*, 26 S. E. 703, 120 N. C. 498. Damages on further incapacity to earn livelihood may be allowed though the

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petition contained no specific averment as to plaintiff's ability to earn a livelihood, nor as to what extent it would be impaired in the future. *Schmitz v. Railroad*, 119 Mo. 277; *Abbitt v. Transit Co.*, 104 Mo. App. 534. There being no objection by defendant to the admission of evidence showing the permanent nature of plaintiff's injury and that he has incurred expenses for medical, etc., treatment, the objection that the pleading does not warrant an instruction on this point comes too late. *Britton v. St. Louis*, 120 Mo. 437; *Golden v. Clinton*, 54 Mo. App. 118; *Abbitt v. Transit Co.*, 104 Mo. App. 534.

GOODE, J.—Charles Hoefle, now deceased, was run over by an automobile belonging to defendant and operated by him on October 25, 1907. Three other men were in the machine with defendant, who was driving. The accident happened about 6:30 o'clock p. m., when deceased, who worked at the Colonial Laundry, 4020 Olive street, in St. Louis, had started for home, walking along the south side of Olive to Westminster Way, where he stood for a few minutes waiting for a car. Two other men were waiting there and as a car came along from the west, bound east, the three stepped out into the street to get aboard. Just then one of the men who was standing immediately east of the deceased, happened to look northeast and saw defendant's automobile, which had been following a car on the west-bound or north street railway track from down town, veer so quickly toward the southwest and around to the south side of the car the men were waiting for, that two of them barely had time to jump out of the way, and deceased was caught, thrown down and dragged under the automobile from fifteen to forty feet, breaking his right arm and otherwise hurting him. The assignment of negligence was running the machine at a high and unlawful speed, and it was supported by evidence for the jury, as defendant's counsel concedes. Deceased was first treated for his arm by a physician

whom he afterwards discharged and sued for unskillful and careless treatment. The petition in that case was offered by defendant as an admission against the interest of plaintiff and being excluded by the court, an exception was taken to the ruling. Subsequently deceased employed other physicians who performed three operations on his arm; for the ends of the humerus bone which had been fractured in the accident had overlapped and never united. Portions of the ends of the bone were taken off in order to obtain a better healing surface, but notwithstanding the three operations, and the fastening of the parts of the bone together with silver wire, the ends never knitted perfectly to the time of the death of Hoefle, which occurred after the trial of the present action. A verdict was given for him for five thousand dollars and after a motion for a new trial had been overruled, he remitted five hundred dollars of the amount. The errors assigned on the appeal, besides the one mentioned, are, first, permitting deceased to testify what amount of money, if any, he had expended for medicines, surgical attention and hospital bills. The reason assigned for this objection was, the petition did not say anything about a hospital bill. Deceased answered he had spent about one hundred dollars for hospital services and three hundred dollars for medicines; but did not yet know what the bills of his physicians would be as he was still under their care. The next error assigned was permitting Dr. Raithel, one of the physicians who operated on deceased, to state the amount of his bill. The witness said deceased was being treated at the time and he could not tell exactly what the bill would be, but it would be between \$250 and \$300. It is also assigned for error that the court wrongly instructed the jury on the measure of damages by empowering them to award damages for loss of earnings which they believed deceased had sustained or would thereafter sustain from his injuries, though the petition

contained no allegation regarding future loss of earnings. Further, that the instruction on the measure of damages was erroneous because it permitted the jury to award as damages expenses necessarily incurred for medical and surgical attention to deceased in consequence of his injuries and directly caused thereby, on an allegation, not that deceased had been compelled to incur the expense, but that he had been compelled to expend large sums of money; namely, had paid out money for expenses. Exceptions were taken also to permitting a witness to state his opinion of the distance in which defendant's machine could have been stopped, for the reason said witness was not qualified to testify as an expert, and to the testimony of this and another witness to the same point, as introducing an element of carelessness not alleged in the petition. We copy the part of the petition wherein the injuries of Hoefle are described:

"Said automobile negligently, carelessly and abruptly crossed to the south side of said Olive street and ran against plaintiff with great force and violence and threw him to the ground and dragged him for a long distance, and broke the bone of his right arm between the elbow and the shoulder and bruised and injured plaintiff about the back, shoulders, arms and hips, thereby permanently injuring him, and greatly shocked and permanently injured plaintiff's nervous system and caused him great pain of body and mind, and consequent expense and loss of time.

"Plaintiff states that by reason of said injuries so inflicted by the carelessness and negligence of defendant, he has suffered and will suffer greatly in mind and body and was and is prevented from pursuing his regular vocation as collector and chief wagon driver or any other ordinary labor or calling and that plaintiff had been compelled to expend large sums of money for medical and surgical attention, medicines and nursing, and is still under the care of a physician and surgeon

by reason of said injuries and will be compelled to expend large sums of money for medicines and medical services in the future.”

The offer of the petition in the action filed by deceased against his first physician for wrong treatment was not accompanied by an offer to prove the physician was not of good reputation or deceased fell short of due care in consulting him. The duty of a party injured by the tort of another to use reasonable care to obviate, as far as possible, bad results from the injury and thereby diminish the damages, extends no further in the matter of selecting a physician to treat the injury, than to select one of good repute. For lack of care and skill shown by such a physician in his treatment, the patient is not answerable, nor is the circumstance admissible to mitigate the damages for which the tortfeasor is liable. [Elliott v. Kansas City, 174 Mo. 554, 74 S. W. 617, and cases cited.] The petition filed by deceased against his physician was properly excluded because it tended to establish no fact favorable to defendant.

Error is assigned for receiving evidence of the sum paid by deceased for hospital expenses. We think the assignment not well taken, despite the strict rule which prevails in this State about not receiving evidence of, nor authorizing the jury to allow for, items of special damages not averred. The petition alleges deceased had been caused expense and compelled to expend money for medical and surgical attention, medicines and nursing. It would be better to enumerate, among the claims for damages, a hospital bill, if the amount of one is expected to be recovered; but as evidence of payment of such a bill was received in this case without objection, we hold the court did not err in letting the jury include the item in their award. [Mellor v. Railroad, 105 Mo. 455, 16 S. W. 849.]

As regards the error assigned for permitting Dr. Raithel to state the amount of his bill, we remark the question was badly framed, for he should have been asked to state the reasonable value of his services. However, in view of the amount remitted from the verdict, this does not constitute reversible error, if it would in any event.

Much is said against the direction to the jury to award damages for future loss of earnings, as being beyond the scope of the petition. Defendant's counsel insist there was nothing in the petition about loss of earnings; but this is a mistake, for loss of time is averred, which is the same, in legal effect, as averring loss of earnings. [Slaughter v. Railroad, 116 Mo. 269, 23 S. W. 760.] It is earnestly insisted the petition, if it charged loss of earnings or of time, referred only to the time anterior to and contemporaneous with the trial. The averments of the petition are, plaintiff was "caused . . . expense and loss of time; . . . was and is prevented from pursuing his regular vocation as collector and chief wagon driver, or any other ordinary labor or calling." Those averments do not relate to future earnings, and only inferentially can the petition be said to suggest future loss of time; that is, by alleging permanent injuries, and such an allegation has been held not to be equivalent to alleging loss of time or of earnings. [Coontz v. Railroad, 115 Mo. 669, 22 S. W. 572; Gerdes v. Christopher & Simpson, etc., Co., 124 Mo. 347, 27 S. W. 615.] But it has been held, too, future loss of earnings signifies diminution of earning capacity in the future and may be shown without a special averment. [Bartley v. Trorlicht, 49 Mo. App. 214, 218.] In the opinion in the cited case this court said the decisions requiring a special averment in order to recover loss of earnings, had been given in cases where the loss sought to be recovered was of past earnings, and it never had been the practice in actions for personal injuries to aver

specially damages would accrue from loss in the future of earning capacity. Considering all the facts of the present case, we are not inclined to reopen the question thus adjudged in a prior decision. Evidence was received, and without objection, as follows: The deceased had supported himself and family by his earnings as driver and collector for a laundry company; after his injury and to the time of the trial, fifteen months later, he had been unable to do anything, was then unable to do anything; had been in the hospital much of the time, had had three or four operations on his arm and the fractured bones never had united; the arm was shorter by some three inches than his other arm; he had undergone great suffering from it and, moreover, from hurts in the back and other parts of the body and had been knocked unconscious at the time of the accident. The physicians who attended him testified the prospect of recovery was gloomy and the arm never would be as good as before, which was nearly a self-evident fact. Plainly deceased was so disabled that diminution of earnings in the future was certain, and we cannot see how defendant was prejudiced by lack of a specific averment on the subject. Our minds are clear that he was not, and this being true, it is our duty to overrule the assignment of error. [R. S. 1899, sec. 865.]

A further point is made against the verdict because the jury were authorized to consider the expense bills incurred by the deceased for treatment, whereas the petition averred bills had been paid. Decisions on this point go no further than to hold if evidence of the incurring of bills is offered under a petition which avers payment of them, the evidence is incompetent against an objection. [Spengler v. Transit Co., 108 Mo. App. 329, 83 S. W. 312.] In the cited case this court held if such evidence is received without objection, it may be referred to the jury; and this is in accord with the ruling in Mellor v. Railroad, *supra*.

One of the eyewitnesses of the accident was permitted to state, against an objection, the distance in which the automobile could have been stopped, and the same testimony was drawn from a witness for defendant on cross-examination, defendant objecting to the question. The first witness was said not to be qualified to testify as an expert. He was an eyewitness of the accident and testified his opinion about the distance in which a machine like defendant's and going at the speed it was on the occasion in question, could be stopped. We overrule the assignment, as the witness said he had had considerable experience in observing the speed of machines, had attended races, ridden in automobiles every day and read their speedometers, had been with the Diamond Rubber Company in its repair department for years and said company left to his judgment all matters based on speed. We think reason has not been shown for a reversal on this ground, as the trial court had some degree of discretion in the matter. The case of *Sears v. Railroad*, 6 Wash. 277, is exactly in point, though the witness therein was not so well qualified as the one who testified in this case. See, too, *Bradford v. Railroad*, 64 Mo. App. 475; *Stotler v. Railroad*, 200 Mo. 107, 98 S. W. 509. The objections to said testimony were directed likewise against its relevancy to the issues, as the petition did not assign for a cause of action, negligent failure to stop the car. In its answer defendant charged contributory negligence, saying deceased passed hurriedly from the sidewalk into the street near the automobile and so near it was impossible to stop in time to avoid injuring deceased. Defendant put in evidence to prove those allegations, and to meet the defense thus attempted, it was proper to permit plaintiff to prove the possibility of stopping the machine after the dangerous position of deceased should have been seen; not as a basis of recovery, but to overcome the defense. The court allowed a verdict against defendant only on the

ground of excessive speed and not for failure to use ordinary care to stop the machine after the danger of an accident was visible.

The judgment is affirmed. All concur.

**JANE McMORRIS et al., Respondents, v. KEELEY
REAL ESTATE CO., Appellant.**

St. Louis Court of Appeals, April 5, 1910.

1. **LANDLORD AND TENANT: Leasehold: Re-Assignment: Effect Upon Covenants: Good Faith.** The law permits an assignee of a leasehold to rid himself of liability for future breaches of the covenants of a lease by re-assignment, and this right is not limited by a requirement that he shall assign to a responsible party only, but the transfer must be actual—not merely formal, with the assignor left in enjoyment and the parties intending the use of the premises shall not be transferred
2. ———: ———: ———: ———: **Reason for Rule.** The liability of the first assignee on the covenants of the lease for breaches occurring while he is in possession does not arise from a contract made by him wherein he bound himself by covenants, but from his having come into privity of estate with the original lessee, by taking an assignment of the leasehold from the latter, and hence when the privity of estate is sundered, the liability of the assignee on the covenants ceases.
3. ———: ———: ———: **Transaction Held to be Fictitious: Facts Stated.** An assignee of a lease, in order to escape the payment of taxes in accordance with the covenants of the lease, executed an assignment of it to an irresponsible party for the sum of five dollars and simultaneously took a lease of the same premises from said party, for a term a few days less than the unexpired term of the original lease, the consideration being the sum of ten dollars. There was no change of possession; the sublease was taken simultaneously with the assignment; and the sublessor had no use for the premises and did not know what he was about, further than that he was getting five dollars for a few minutes' time. *Held*, said assignment was a sham, the party executing it really owned the original leasehold all the time and occupied it as a tenant of the owner without a moment's intermission, and that he was liable for the payment of the taxes.

Appeal from St. Louis City Circuit Court.—*Hon. Wm. M. Kinsey*, Judge.

AFFIRMED.

R. M. Nichols for appellant.

(1) If there was a conflict of evidence as to intention in the execution of the written document, it was proper to submit the question of intention to the jury. There being no evidence that the parties did not intend an actual transfer, and the purpose of the parties in the execution and delivery of the written document being gathered exclusively from the construction of the instrument, the intention was a matter of law for the court, and not for the jury. The verdict was against the evidence. 1 Thompson on Trials, secs. 1065, 1096; Lockwood v. Ins. Co., 47 Mo. 50; Price v. Evans, 49 Mo. 396; Winson v. Radway, 45 Mo. App. 123; Northwestern F. Co. v. Danielson, 57 Fed. Rep. 915. (2) The first instruction violates the well-settled principle of the law, because it tells the jury that if they find it merely colorable and fictitious, and not intended by the parties as an actual transfer "but was merely designed and intended to relieve the said Keeley Real Estate Co. from liability for the payment of taxes under the lease," for the reason that it is the law that Keeley Real Estate Co. could make the assignment for the express purpose of avoiding liability for the payment of taxes under the lease. Tyler v. Giesler, 74 Mo. App. 543; Jones on L. & T., sec. 456; Wood on L. & T., sec. 340 (2 Ed.), and sec. 337 (3 Ed.); 18 Ency. Law, p. 674; Taylor v. Shum, 1 Bos. & T. 21; Johnson v. Sherman, 15 Cal. 287; Nat. Gas. Co. v. Johnson, 123 Pa. St. 576; McLean v. Caldwell, 107 Tenn. 138; Tibbals v. Iffland, 10 Wash. 451; Sharon Cong. Soc. v. Rix, 17 Atl. R. 719; 1 Wash. Real P. (2 Ed.), sec. 13, p. 438; Tait v. McCormick, 23 Hun (N. Y.) 218; Johnson v. Bates, 48 N. Y. Sup. Ct. 180. (3) The instruction violates the

law when it tells the jury that if they "further believe from the evidence that said Henry Kittrell never took actual possession of the premises covered by the lease" because it was not necessary for Henry Kittrell to take actual possession, and because the court in that part of the instruction submits to the jury the legal effect of the sub-lease of Henry Kittrell to Keeley Real Estate Co., which could be given by Kittrell upon no theory other than that he did take actual possession of the premises. *Johnson v. Sherman*, 15 Cal. 287; *Taylor v. Shum*, 1 Bos. & T. 21; *Wood on L. & T.* (1 Ed.), sec. 349; *Tyler v. Giesler*, 74 Mo. App. 543. (4) The part of the instruction "that said Keeley Real Estate Co. continued in beneficial use and enjoyment of the premises and received the rents due thereafter from subtenants in occupation of said premises" was given without any warrant in the evidence and in the face of the undisputed testimony that the defendant's possession was ascribable to the sublease from Kittrell. (5) The first instruction is misleading, and misstates the law to the jury. After telling the jury that the Keeley Real Estate Company admits that it became the assignee, the instruction further directs: "You are further instructed that by accepting said assignment said defendant became liable for the payment of taxes thereafter becoming due against the premises during the unexpired term of the lease." There is nothing in any part of the instructions given, to qualify this broad declaration. The next paragraph does not do it. It is entirely outside of the issues. The next paragraph is likewise a misstatement of the law, as much a misstatement of the law and as foreign to the issue as the direction that "Henry Kittrell never took actual possession of the premises." See authorities under the second and third points, *supra*. (6) The second instruction asked for plaintiff submits to the jury the following question of law: "And in determining whether or not the assignment . . . was an actual

transaction intended to vest the ownership and beneficial enjoyment of the leased premises according to its purport . . . or whether said transaction was merely colorable or fictitious, designed solely to relieve Keeley Real Estate Co. from liability for the payment of taxes under the lease," and is contrary to the well-settled law, because there can be no fraud in an assignee assigning a lease to get rid of liability. *Tyler v. Giesler*, 74 Mo. App. 543; *Jones on L. & T.*, sec. 456; *Taylor v. Shum*, 1 Bos. & T. 21; *Tait v. McCormack*, 23 Hun (N. Y.) 218; *Underhill on L. & T.* (Ed. of 1900), sec. 649, p. 1090. (7) The instruction that if the jury believed the assignment was "merely colorable and fictitious" was in effect submitting to the jury the question as to whether the assignment was fraudulent when there could be no fraud in the act. *Railroad v. Alfree*, 64 Io. 500; 7 Cyc., p. 400, tit. "Color;" *Black's Law Dict.*, tit. "Color" and authorities cited. (8) There is no covenant against or regulating assignment. The lease could therefore be transferred at will. The assignments shown in evidence were sufficient to carry the title from Keeley Real Estate Co. to Kittrell. 2 *Underhill on L. & T.*, p. 1050, sec. 1027; *Clark v. Aldrich*, 40 N. Y. 5440; *Reid v. Werssiner & Son B. Co.*, 88 Mo. 234.

Thomas S. Meng for respondents.

GOODE, J.—An action on a covenant in a lease for taxes for the years 1906 and 1907, which the lessee and his assigns were bound by the covenant to pay. The defense is that defendant company is not in privity of estate with the original lessee and hence not bound by the covenant. Henry A. Cunningham was the original lessor, Geo. M. Keeley the original lessee, and the premises are two three-story buildings in the city of St. Louis on Chestnut street. The term was for twenty years commencing March 18, 1890, and expiring

March 18, 1910, at an annual rental of twelve hundred dollars for the first half of the term and thirteen hundred dollars for the remaining half, payable quarterly. Various covenants, some of them binding on the lessor and some on the lessee, are contained in the contract of lease, but we are not concerned with any but this one: "Said lessee agrees that as further rent for said premises, he will at all times during said term of said lease, pay all taxes, whether general or special, which may become due on said premises or any part thereof." We find no covenant forbidding or even referring to an assignment of the term, the twelfth clause merely authorizing the lessee to sublet the whole or part of the premises and binding the original lessee for all acts of the sublessee. The original lessor Cunningham, died in 1902, having devised the premises to plaintiffs; and the original lessee, George M. Keeley, died in 1904. The latter's personal representatives, Chas. Z. Trembley and Hannah Miller, who were the executor and executrix of his estate, assigned the remainder of the term on May 26, 1906, to Louis Jost for \$2510, and on the same day Jost assigned the term to the Keeley Real Estate Company for the same consideration. No question was made about the validity of these assignments, which are mentioned as links in the chain of transfers leading to the title to the leasehold now held by the Keeley Real Estate Company. As will be perceived, it became the owner of the term and tenant of plaintiffs on May 26, 1906, by assignment from Louis Jost. Chas. Z. Trembley is president of the Keeley Real Estate Company, Hannah Miller its secretary and Louis Jost its vice-president. The company is out of business, but for eight years prior to 1906, was doing business at No. 1113 Chestnut street, one of the demised buildings. Prior to the final settlement of the estate of Geo. M. Keeley, and during the second half of the term of the leasehold, plaintiffs presented a demand in the probate court against his

estate for the cash rent which would accrue under the lease to the end of the term at the rate of thirteen hundred dollars a year. This demand included also the taxes for 1905 and was allowed by the probate court and by the circuit court on appeal, less a deduction or rebate for the unearned rent at the rate of six per cent per annum, and after allowance was paid. All the rent for the entire term, except taxes to accrue after 1905 having been thereby settled, the leasehold was a valuable asset of Keeley's estate and when sold by the executor and executrix, brought the price we have stated. To get rid of the taxes to accrue in the future and which, as assignee of the term, it would be bound to pay, the Keeley Real Estate Company on May 26, 1906, the day the lease was assigned to it by Louis Jost and the day it was assigned to Jost by the executor and executrix of the original lessee's estate, executed another assignment of the term to Henry Kittrell. This man was a negro ragpicker who lived on a vacant lot owned or controlled by Trembley, Hannah Miller or the Keeley Real Estate Company, in the west part of the city. Kittrell did odd jobs about town besides pursuing his vocation of ragpicker, and now and then worked for the persons interested in the Keeley Real Estate Company and was favored by them with small loans. The transaction with him occurred in this way: He entered the office of the Keeley Real Estate Company on May 26th; Mrs. Miller asked him if he wanted to make some money and he said he did; she then asked him if he had five dollars and he said he had. Thereupon she proposed to sell him the leasehold on the two buildings, Nos. 1111 and 1113 Chestnut street, for five dollars, stipulating that he should lease them immediately to the Keeley Real Estate Company for ten dollars. To this proposition Kittrell assented, an assignment was made to him by the Keeley Real Estate Company, and he executed a lease back to said company of the premises for the whole unexpired part of

the term of the original lease except about eighteen days; that is, he gave a lease for forty-four months and fifteen days from May 26, 1906. Kittrell could not read and did not read either the assignment to him or the lease contract he executed to the Keeley Real Estate Company. The term thus created was to end February 10, 1910 and the rent exacted for the entire period was ten dollars. Kittrell, if one judges from the face of the instrument, was careful to exact covenants from the Keeley Real Estate Company, binding it not to suffer or commit any depredations on the premises nor use nor permit them to be used in any other manner than was specified, without his consent, to quit and deliver up possession to him at the end of the term, allow him to enter at any reasonable hours to inspect the premises, not permit dirt and rubbish to accumulate on them, etc. It is frankly avowed in behalf of defendant that these transfers were executed solely for the purpose of exonerating the Keeley Real Estate Company from the obligation to pay taxes on the premises which would fall due after 1905. Kittrell never went into occupation, though he remained in the office after the transfer for about an hour. Hannah Miller explained to him that he had not given back a lease for quite the full portion of the unexpired term of the Cunningham lease, but would have sixteen or eighteen days left after the expiration of the lease given by him to the Keeley Real Estate Company. When the attorney for plaintiffs demanded of the Keeley Real Estate Company payment of the taxes on the property for the years 1906 and 1907, said company refused to pay them, asserting it was exonerated from liability because it was in occupation of the premises as tenant of Henry Kittrell and not by virtue of an assignment of the original lease; hence was not in privity of estate with the original lessee, Geo. M. Keeley, or any one claiming under him. The attorney for plaintiffs

testified defendant's president told him Kittrell was a mere straw man in the transfers to and by him, and refused to tell where Kittrell was so the transaction could be investigated. Defendant's president testified he did not remember stating Kittrell was a straw man nor that he refused to inform plaintiffs' attorney of his whereabouts. Instructions were requested by plaintiffs and given by the court, the purport of which was that if the jury believed the written assignment from the Keeley Real Estate Company to Henry Kittrell was colorable and fictitious, not intended by the parties to operate as an actual transfer to Kittrell of the leasehold described in it, but merely to relieve the Keeley Real Estate Company from liability for the payment of taxes under the lease for the unexpired part of the term, and if the jury believed Kittrell never took possession of the premises under the assignment of the leasehold to him, but said company continued in the beneficial use and enjoyment and received the rents accruing from subtenants thereunder, then the assignment to Kittrell was of no force or validity as against plaintiffs and the Keeley Real Estate Company remained liable under the covenants of the lease to pay taxes. The purport of the instructions requested by defendant, all of which were refused by the court, was that if the jury found the Keeley Real Estate Company assigned the lease to Henry Kittrell on May 26, 1906, for the sum of five dollars, and further believed said Kittrell sublet the property to said company on the same day and the latter company occupied the premises under said sublease, then though the jury believed said company assigned said lease for the express purpose of ridding itself of liability under the lease to pay taxes, and further believed Henry Kittrell was insolvent, and believed the company in making the assignment to Kittrell and taking from him a sublease, retained a beneficial interest in the lease, nevertheless they must find for the defendant. Those opposed theo-

ries were presented in a series of requests, containing immaterial variations, and we need not set out the instructions given and refused in full. It will be perceived defendant's contention is, that defendant had a right to assign the lease to Kittrell, no matter if he was insolvent, and instantly take back a contract of lease from him in order to enable defendant to evade liability on the covenant to pay taxes. The right of an assignee of a leasehold to re-assign it to any one, solvent or insolvent, in order to get rid of burdensome covenants, appears to be supported by the books, subject to this qualification: There must be a valid assignment of the leasehold to the junior assignee with the intention that he shall become the tenant, and not a sham or bogus transfer, made with no intention for him to occupy the premises as tenant in lieu of his assignor, but intending rather that the latter shall remain in occupancy and enjoyment; for generally speaking continuance of possession by the assignor will continue his liability. Otherwise stated, the law permits an assignee of a leasehold to rid himself of liability for future breaches of the covenants of a lease by re-assignment, and this right is not limited by a requirement that he shall assign only to a responsible party. [Jones, L. & T., sec. 456; Wood, L. & T. (2 Ed.), sec. 340; Tyler v. Giesler, 74 Mo. App. 543; Taylor v. Shum, 1 Bos. & T. 21; Washington Nat'l Gas Co. v. Johnson, 123 Pa. St. 576; McLean v. Caldwell, 107 Tenn. 138.] Yet the transfer must be actual and not merely formal, with the assignor left in enjoyment and the parties intending the use of the premises shall not be transferred. The liability of the first assignee on the covenants of the lease for breaches occurring while he is in possession does not arise from a contract made by him wherein he bound himself by covenants, but from his having come into privity of estate with the original lessee by taking an assignment of the leasehold from the latter. Hence when the privity of estate is

sundered, the liability of the assignee of the covenants ceases. But the privity must be sundered to accomplish this result, and there is no sundering if the first assignee colludes with any person to make a wholly fictitious and colorable assignment, unaccompanied by change of possession or purpose that the second assignee shall be substituted as tenant of the premises; otherwise colorable assignments would be resorted to constantly by first assignees to evade onerous covenants and still use the premises. [2 Underhill, L. & T., sec. 649, p. 1091; 2 Platt, Leases, 413; Taylor v. Shum, supra; Knight v. Peachy, Ventus Rep. 329; Philpott v. Hoare, Ambler 380; Onslow v. Corrie, 2 Maddocks 345; Fagg v. Dobie, 3 Younge & Col. 96; Springer v. Loan Co., 202 Ill. 17; Trabue v. McAdames, 8 Bush. (Ky.) 74; Negley v. Morgan, 46 Pa. St. 281.] We might find it difficult to support the refusal of some of the instructions requested by defendant if there was any evidence for them to stand on; but only one conclusion of fact is possible, and it is that there was no real assignment of the term or any portion of it by the Keeley Real Estate Company to Henry Kittrell, but instead a form of assignment was gone through which was without substance. There was no change of possession which, under the circumstances present, is the fact most essential to the release of the defendant; the sublease was taken simultaneously and Kittrell did not want and had no use for the premises and did not know what he was about, further than that he was getting five dollars for a few minutes time. He said he did not read the documents, but knew there was nothing wrong in them because he did not believe "a lady like Mrs. Miller would cheat him." Because the assignment to him was a sham, and defendant really owned the original leasehold all the time and occupied the premises as tenant of plaintiffs without a moment's intermission, the judgment will be affirmed. All concur.

CHARLES KNITTEL et al., Appellants, v. UNITED RAILWAYS COMPANY OF ST. LOUIS, Respondent.

St. Louis Court of Appeals, April 5, 1910.

1. **STREET RAILWAYS: Negligence: Killing Child: Motorman's Failure to Keep Vigilant Watch: Evidence Held Sufficient.** In an action against a street railway company for the death of a child run over by one of its cars, evidence that the accident occurred in broad daylight and the view of the street was unobstructed, so that the motorman, had he been looking ahead, as the ordinance required, could have seen the boy as he approached the track, and that after the boy had been run over and was under the wheels, the motorman was not aware of the fact and did not get off his car to see what it had struck until persons on the sidewalk were taking the boy from under it, and that he then inquired of a bystander if it was a dog that was under the car, well nigh conclusively proves he was keeping no watch ahead, but had his attention diverted from the track.
2. ———: ———: ———: **Negligent Speed: Evidence Held Sufficient.** In an action against a street railway company for the death of a child run over by one of its cars, evidence of one who was familiar with the running of cars along that street that the car was running fast—faster than cars usually ran on that street, was sufficient to prove the speed was too high, considering the locality and that a large public school of twenty-four rooms was located about two blocks away and that the children had just been dismissed from it.
3. **APPELLATE PRACTICE: Error in Favor of Appellant.** One may not on appeal complain of error in his favor.
4. **STREET RAILWAYS: Negligence: Killing Child: Evidence: Res Gestae: Spontaneous Utterance of Motorman.** In an action for the death of a child run over by defendant street railway company's car, testimony that almost instantly after the accident defendant's motorman, while lowering the window to look out and see what had happened, asked witness if there was a dog under the car, was part of the *res gestae* and admissible.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

AFFIRMED AND REMANDED.

Lee Sale for appellants.

(1) The court erred in setting aside the verdict because the statute requires that before granting a new trial the court must be satisfied that an improper verdict was occasioned by the error on account of which the new trial is granted. R. S. 1899, secs. 659, 672, 800, 865. (2) The instructions offered by defendant assumed and conceded that the motorman in charge of the car which ran over plaintiffs' child was the defendant's motorman, that the car in question was defendant's car, and that the track on which the plaintiffs' child ran was defendant's track. This rendered immaterial the failure of plaintiff to produce evidence of the ownership or control. *Walsh v. Railroad*, 102 Mo. 582. (3) Even if the instructions were open to the objection that they authorized the jury to find ownership of the car in the defendant in the absence of any evidence upon this point, yet, inasmuch as the defendant offered instructions which are open to the same objection, it cannot complain of the action of the court in this respect. 11 Ency. Pl. and Pr., 121; *Dunlap v. Griffith*, 146 Mo. 283; *Lange v. Railroad*, 208 Mo. 458; *Collier v. Gravin* (Neb.), 95 N. W. 842; *Kinlen v. Railroad*, 216 Mo. 145. (4) The court should have taken judicial notice of the fact that all of the street cars operated in the city of St. Louis at the time of the accident were operated by defendant. *Johnson v. Railroad*, 104 Mo. App. 588; *Kansas v. Pigg*, 97 Pac. 859, 19 L. R. A. (N. S.) 848; *United States v. Ash*, 75 Fed. 651.

Glendy B. Arnold for respondent; *Boyle & Priest* of counsel.

(1) The order granting a new trial should be affirmed by this court for the following reasons: First.

Because the order is grounded solely upon the giving of erroneous instructions to the jury, and as it does not appear from the appellants' abstract that the bill of exceptions, preserving the evidence, instructions and exceptions to the order granting a new trial, was signed by the judge who tried the case, this court must indulge the presumption that the order was properly entered. *Harding v. Bedoll*, 202 Mo. 625; *Milling Co. v. St. Louis*, 222 Mo. 306. Second. The demurrer to the evidence should have been given because plaintiffs failed to make out a case under the pleadings and the law. *Matz v. Railroad*, 217 Mo. 298; *Reno v. Railroad*, 180 Mo. 485. Third. The court erred in giving conflicting instructions. Plaintiffs' second instruction submits the issue of negligence speed and defendant's first instruction withdraws that issue from the jury. There being no evidence of negligent speed this of course, was prejudicial error to the defendant. *Hall v. Railroad*, 219 Mo. 591; *Frank v. Railroad*, 57 Mo. App. 181; *Blue-dorn v. Railroad*, 108 Mo. 449. Fourth. Plaintiffs' first and second instructions are erroneous because there is no evidence to support the negligence therein submitted. *Stetzler v. Railroad*, 210 Mo. 714; *Hienzle v. Railroad*, 182 Mo. 599. Fifth. The court erred in refusing defendant's fourth, fifth, sixth, seventh and eighth instructions. (2) Defendant's instructions 4, 6 and 8 should have been given. Those instructions were designed to confine the jury to the issues made by the pleadings and evidence by withdrawing from their consideration the unproven charges of negligence contained in the petition. There is not an iota of evidence to prove any of the specifications of negligence withdrawn by those instructions and it was reversible error to refuse them. *Campbell v. Railroad*, 175 Mo. 161. (3) Defendant's fifth instruction should have been given because the alleged statement of the motor-man to Mrs. Kleaver after the accident had occurred, was not part of the *res gestae*. *Koenig v. Railroad*,

173 Mo. 721; Ruschenberg v. Railroad, 161 Mo. 79. (4) Defendant's seventh instruction refused should have been given in this case because the evidence of plaintiff's witness, Nolting, shows that the boy went on the track about a foot in front of the car, and there is not a scintilla of evidence to show that the car could have been stopped after the danger to the boy was apparent. Masterson v. Transit Co., 204 Mo. 520.

GOODE, J.—Appeal from an order granting a new trial on defendant's motion. The grounds assigned in the order for the court's action in allowing a new trial were, in effect, these: The court had committed error in refusing to sustain a demurrer to plaintiffs' evidence, in giving erroneous instructions for plaintiffs and in giving erroneous instructions on the court's own motion. A memorandum was filed by the court and brought up with the appeal as part of the bill of exceptions, which sets forth the reason why the court deemed it had committed error in the particulars mentioned. Stated briefly, the reason was the court thought plaintiffs had put in no evidence to prove defendant company was operating the street railway car at the time of the accident, or had said car under its control; hence instructions authorizing a verdict against it, if certain facts were found, should not have been given. The action is one to recover damages for the death of a son of plaintiffs who was killed at the age of seven years, by being run over by an electric car on south Broadway in the city of St. Louis, not far from the intersection of said street with Wisconsin avenue. The fatality happened February 27, 1907, and between three and four o'clock in the afternoon. It will be seen an essential ingredient of the cause of action against defendant was, that the latter was in control of and operating the car through its employees and was responsible for their defaults. At the conclu-

sion of the evidence for plaintiffs, the court below intimated doubt whether proof of this requisite fact had been made; whereupon plaintiffs' counsel said he thought sufficient proof had been introduced and that he preferred to stand on the record as it then was, rather than reopen the case. Counsel for defendant refused to waive the point, but said he was in doubt about the proof having been introduced. Thereupon counsel for plaintiffs rested and defendant's counsel declined to introduce any testimony. The case was submitted to the jury under instructions and a verdict was returned in favor of plaintiffs for four thousand dollars. Counsel for plaintiffs concedes in his brief no evidence was introduced to prove ownership of the car by defendant, but contends this point was waived by defendant's counsel by requesting instructions wherein the car was spoken of as "defendant's car," and the motorman who was operating it, as "defendant's motorman." Counsel for defendant has conceded the court was wrong in the reason assigned for ordering a new trial, and that defendant admitted in the instructions it requested, ownership and operation of the car. In view of this contention we will not examine the point, though we must not be deemed even to intimate the court below was wrong in its conclusion. After declining to attempt to support the order for new trial on the theory adopted by the court in granting it, defendant's counsel advances other reasons why the order was right and should be affirmed; and an examination of these reasons will require a fuller statement of the case. The petition assigns four negligent acts as the cause of the catastrophe: First, the motorman failed to keep a vigilant watch ahead, as required by the city ordinance, for children on the track or moving toward it, immediately prior to running over plaintiffs' child; second, failed to handle the brakes and controller of the car so as to enable him to stop on the sudden

appearance of danger to persons on the track or approaching it; third, permitted the car to move at a rate of speed which, under the circumstances, was dangerous and excessive; fourth, negligently permitted the car to run without so adjusting the brakes as to enable him to stop it quickly on the sudden appearance of danger to a person on or approaching the track. The contention is put forward that there was no evidence to support either of those averments of negligence; but we reject this proposition. The evidence well-nigh conclusively proves the motorman was keeping no watch ahead, but had his attention diverted from the track. After the boy had been run over and was under the wheels of the car, the motorman was not aware of the fact and inquired of a woman who was on the sidewalk, if it was a dog that was under the car; or as her testimony suggests, whether it was a dog or a rock. The accident occurred in broad daylight and the view along the street was unobstructed for quite a distance from where the boy was struck, so there was nothing to prevent the motorman from seeing him as he approached the track had the motorman been looking ahead as the municipal ordinance required. The boy walked toward the track from the west side of Broadway and had to proceed about seventeen or eighteen feet from the curb to get on the track. He was a student at the Shepard School, some two blocks away; a large public school of twenty-four rooms, from which the children had just been dismissed. It was the same locality and school which figures in the decision of *Schmidt v. Transit Co.*, 149 Mo. 269, 163 Mo. 645, 50 S. W. 921, 63 S. W. 834. The Supreme Court held in both opinions delivered in said case the locality was one where the presence of children on the railway tracks at dismissal hours was to be expected, and motormen were under the duty to watch for them and be careful to avoid injuring them. This motorman was so oblivious of what had happened he did not get off the

car to see what it had struck until persons on the sidewalk had reached the car and were taking the boy from under it. As to the issue of excessive speed, a boy witness who was standing on the sidewalk and who was familiar with the running of cars along that street, testified the car was running fast and faster than cars usually ran on that street. This was evidence under the decision of the Schmidt case, *supra*, to prove the speed was too high, considering the locality. We find no evidence to prove the motorman negligently failed to handle the brakes and controller of the car in such a way as to enable him to stop quickly on the appearance of danger to a person on the track or approaching it. The chance of some one getting into the danger zone had not occurred to the motorman, if the witnesses are to be believed. Neither do we find any evidence tending to show the motorman permitted "the car to run without adjusting the brakes . . . so as to enable him to stop the car quickly on the sudden appearance of danger to a person on or approaching the track." This fourth assignment of negligence is nearly the same as the third one, and how the brakes and other devices to stop the car were adjusted at the time was not in evidence. The cause of the death of the child may have been lack of vigilant watch ahead on the part of the motorman, or the high speed of the car, or both. Issues on those assignments were submitted and ought to have been, according to the decision in the Schmidt case and other decisions; that is, were submitted in instructions granted for plaintiffs. In an instruction given for defendant the court informed the jury there was no evidence of excessive speed. This was an error in favor of defendant of which it cannot be heard to complain. Nevertheless we think on the record before us the grounds for a verdict for plaintiffs should have been restricted to the alleged failure to keep a vigilant watch and operating the car at too high speed. The court is said to have erred

in permitting the woman witness to testify that when the car stopped the motorman asked her, as she stood on the sidewalk, if there was a dog under the car. This evidence was admitted as part of the *res gestae*, but counsel for defendant insist it was not so closely connected with the accident as to be part of the *res gestae*, but was rather in the nature of hearsay and not competent against defendant. It appears to have been a spontaneous utterance of the motorman, made almost instantly after the boy had been run over, as the motorman was lowering the window to look out and ascertain what had happened, and it throws a vivid light on the state of the motorman's mind at the time. [Stoeckman v. Railway, 15 Mo. App. 503.]

The order for new trial is affirmed and the cause remanded. All concur.

FRANK COPE et al., Respondents, v. C. E.
THURSTON COMPANY, Appellant.

St. Louis Court of Appeals, April 5, 1910.

1. **SALES: Contract: Construction.** An order for a carload of lemons equal to those first ordered, which were "fancy lemons, Harbor Brand," would require the seller to furnish "fancy lemons, Harbor Brand," if none but that grade and brand would be equal to those first bought; but if standard lemons or any other variety were considered in the trade to be equal to "fancy lemons, Harbor Brand," the second order could be filled by sending lemons of a different variety.
2. **———: ———: Breach of Contract: Market Value: Evidence.** In an action for breach of a contract to sell lemons of a designated quality at Topeka, Kansas, a book of original entries showing sales at auction of lemons in the city of St. Louis was not competent evidence, since lemons were proved to have had a definite market value in Topeka around the dates of the purchase and it was therefore not necessary to go to another market to ascertain their value.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

REVERSED AND REMANDED.

Joseph A. Wright for appellant.

(1) The court erred in giving instruction No. 2. on the second count. The contract for the second car only required the lemons to be equal to the first car. while the instruction required them to be fancy lemons. the fancy lemons of various packers and localities varying both in quality and price. Instruction No. 3 is open to the same objection. 2 Mechem on Sales, par. 1337, 1338 and 1339; Alvin Fruit & Truck Assn. v. Hartman, 123 S. W. 957; DeWitt v. Berry, 134 U. S. 306; Sweat v. Shumway, 102 Mass. 365. (2) The court erred in rejecting evidence of sales at auction in St. Louis for the period in question, and in rejecting evidence that the freight rate was the same to both St. Louis and Topeka. 16 Enc., 1143-1145; 2 Wharton on Evi., par. 1290; Sinclair v. Railroad, 70 Mo. App. 588; Jones v. Railroad, 53 Ark. 27; Cohen v. Platt, 69 N. Y. 348; Harris v. Railroad, 58 N. Y. 660.

Benj. J. Klene for respondents.

1. The instructions 2 and 3 fairly presented to the jury the plaintiffs' theory of the case, to-wit: That the plaintiffs purchased "choice" lemons, and that defendant delivered instead an inferior grade of lemons, to-wit, "standard" lemons, and stated a correct interpretation of the contract. Fruit & Truck Assn. v. Hartman, 123 S. W. 957. 2. It is the general rule in a suit for the breach of a warranty, that the measure of damage is the difference between the contract price and the value of the goods actually delivered at the place of delivery, to-wit, Topeka, at or about the time of the delivery. Buffington v. Railroad, 118 Mo. App.

480; Davis v. Railroad, 122 Mo. App. 644; Andrews v. Schreiber, 93 Fed. 367; Miles v. Withers, 76 Mo. App. 91; Brown v. Emerson, 66 Mo. App. 63; Hayner v. Churchill, 29 Mo. App. 676; Brockhaus v. Schilling, 52 Mo. App. 73; Bank v. Crocker, 111 Mass. 166; Erwin v. Harris, 87 Ga. 333; Ramish v. Kirschbaum, 109 Cal. 659. 3. The contract was to sell "fancy lemons" and was a warranty of their quality, and to furnish "standards" instead was a breach of such warranty. Fruit & Truck Assn. v. Hartman, 123 S. W. 957.

GOODE, J.—Through C. W. Page, a broker in Topeka, Kansas, plaintiffs, who are fruit dealers in said city, purchased on April 24, 1907, of defendants, who are fruit dealers in Riverside, California, a carload of lemons. The purchase was made upon the following telegram sent by defendants to Page and submitted by him to plaintiffs:

"Riverside, Calif., April 24, 1907.

"We quote for spot cash subject to being unsold; car shipped 23rd; Fancy Lemons Harbor Brand, 30 boxes 240s; 305 boxes 300s, 75 boxes 360s, \$3.35 per box; discount on 240s, 25 cents. Wire quick if wanted, others figuring on it.

"C. A. THURSTON COMPANY."

Plaintiffs agreed to buy a carload of lemons on the terms of that offer and Page transmitted this message to defendants:

"Topeka, Kansas, April 24, 1907.

"C. E. Thurston Company, Riverside, Calif.

"Answering your wire of to-day Cope accept lemons 3.35. Will wire bank guarantee when confirmed.

"C. W. PAGE."

The next day, April 25, 1907, Page sent the following telegram to defendants pursuant to an order given by plaintiffs for another carload of lemons:

"C. E. Thurston Company, Riverside, Calif.

"Cope offers \$3.35 car lemons equal car bought spot cash we advise shipping ventilation.

"C. W. PAGE."

One of the plaintiffs testified he heard Page read that telegram and instructed him to send it as it was written. Two carloads of lemons were shipped by defendants to plaintiffs to fill the orders shown *supra* and plaintiffs received the fruit, but claimed it was not up to contract and filed a petition in two counts for damages sustained in consequence of defendants having shipped lemons of an inferior quality. We are not concerned on the appeal with the claim for damages because of the supposed inferiority of the first carload, but only with the controversy over the second one ordered April 25th. The testimony goes to show lemons are grown nowhere in this country but California and the dealers in that state sell different varieties under different brands with distinctive names to each brand; these names represent the brands put up by the various lemon growers, are well known to the trade throughout the country, and a fruit dealer can tell from the name of the brand what dealer grew the lemons and what qualities those called for by a brand ought to show. The various grades on the market are standard, choice, extra choice, fancy and extra fancy. An extra fancy lemon is a perfect lemon, or nearly so; fancy lemons are not quite so perfect as extra fancy, but almost equal to them; choice are a little lower grade, perhaps some scars on them; standards are a lower grade, green and scarred and not of good size or keeping quality, as some of the witnesses testified. It will be perceived the lemons offered by defendants in the first telegram were fancy lemons, Harbor Brand, and it appears Harbor Brand is the distinctive appellation of one grade of lemons grown and sold by defendants. The testimony for plaintiffs is that lemons shipped pursuant to the second order were not fancy lemons of the Harbor Brand, but standard lemons of the Royal Blue

Brand, another brand of lemons sold by defendants. The demand was large in Topeka for fancy lemons, but very poor for standard lemons, and the difference in the prices of the two grades in Topeka ran from fifty cents to a dollar a box. There was testimony the price of lemons in Topeka advanced after the middle of April for about thirty days. Testimony was given for defendants to prove Harbor Brand and Royal Blue Brand were "fancy" lemons, and one or more witnesses said the Royal Blue Brand was classed as "extra fancy." In truth there was no uniformity in the testimony of the experts about these matters. There was testimony to show Harbor Brand meant the same thing as "orchard run," and orchard run meant lemons just as they ran from the orchard with the culls taken out, while Royal Blue Brand had many extra fancy lemons. The object of the testimony for defendant was to prove the lemons shipped to plaintiffs pursuant to the second order, though not of the Harbor Brand variety, were "fancy" lemons and equal to Harbor Brand fancy, which was the quality prescribed in the first telegram; that hence the second order, which called for lemons equal to those called for in the first order, was duly filled by defendants. One witness said the Royal Blue Brand averaged about the same as Harbor Brand. This witness said Royal Blue was known simply as a brand and not as orchard run; meaning, we suppose, it did not signify lemons as they came from the orchard without culls being taken out, the lack of culling being, as another witness said, characteristic of orchard run lemons. Some witnesses for defendant testified, in contradiction of those for plaintiff, the market for lemons declined from the middle of April for thirty days. Defendants identified by a witness the record of sales of cars of lemons "in the American Central Fruit Auction in St. Louis from April 1, 1907 to October 5, 1907," from the original book of entries showing the actual report of cars and

the prices received for such cars at auction. The witness had made a list of sales of fruit, giving the same quality and character of the fruit here in question from April 22 to May 21, 1907. He was asked the sale price of Harbor Brand lemons on April 22, 1907, as shown by the aforesaid books of original entries. This really was an offer to prove the sale price of those lemons in St. Louis during that period and the court excluded the evidence, defendant taking an exception to the ruling. The exclusion of this evidence is assigned for error, as is also an instruction granted for plaintiffs which told the jury if they found from the evidence plaintiffs had bought of defendants the carload of fancy lemons mentioned in the second count of the petition, plaintiffs had paid for said lemons so bought, and the lemons actually shipped by defendants were not fancy lemons, but were of an inferior grade, that plaintiffs received the same and objected to the quality and grade of the lemons three days later, the verdict should be for plaintiffs on the second count of the petition in such sum, not exceeding \$450, as the jury might find from the evidence was the difference in the value at Topeka, Kansas, of fancy lemons and those actually delivered to plaintiffs. The verdict was for plaintiffs on the second count in the sum of \$325.

We can hardly surmise what the truth of this case is in view of the conflicting testimony of the dealers in lemons, or see how the jury could, so chaotic are the conclusions to be drawn from the testimony of those experts. We understand the theory of plaintiffs to be that each packer in California had his own trade names, like Royal Blue and Harbor Brand, for lemons grown or packed by him, but the classes or grades of lemons, extra fancy, fancy, choice, standard and orchard run, were uniform among the packers and signified the same quality of fruit, no matter what brand it bore. On this theory there would be extra fancy,

fancy, choice, standard, orchard run and other grades of Harbor Brand, Royal Blue, Windemere and other brands used by packers. If all the testimony went to prove this was true, the conclusion would follow that the order first given by plaintiffs pursuant to the proposal submitted to them for "fancy lemons, Harbor Brand," could not be duplicated by sending "standard lemons Harbor Brand," or "orchard run lemons, Harbor Brand," but might be duplicated by sending, say, "fancy lemons, Royal Blue Brand," or "fancy lemons Windemere Brand," or "fancy" lemons of any brand. That is to say, if lemons were graded the same way in all the brands, the second carload might satisfy the order for lemons equal to those first ordered though some other brand was substituted for Harbor. But the witnesses for defendants cast doubt on this view of the case; for parts of their testimony tended to prove the names applied to the different classes of lemons, such as standard, fancy, extra fancy, etc., did not signify the quality of the fruit and that a standard lemon of some brands was as good as a fancy lemon of other brands. It will be observed the second order did not mention the brand of lemons first bought, but only called for lemons equal to those first bought. Hence we must hold the court erred in submitting to the jury the question whether plaintiffs ordered "fancy lemons" for the second carload. The telegram was not ambiguous but stated an order for lemons equal to those first ordered, which were fancy lemons, Harbor Brand. If none but "fancy lemons" would be equal, then defendants were bound to furnish that grade, and if none but "fancy lemons, Harbor Brand" would be equal, defendants were bound to furnish that grade and brand. But if standard lemons or any other variety were considered in the trade to be equal to "fancy lemons, Harbor Brand," the second order could be filled by sending lemons of a different variety. The jury had the task of ascertaining from the evidence, as best they

could, what lemons would satisfy the terms of the second order. This case is unlike *Alvin, etc., Co. v. Hart*, 123 S. W. 957, wherein it appeared the defendant had ordered fancy Klondike strawberries, and it was held as he had ordered a certain variety, plaintiff had no right to substitute some other variety, because it was as good a berry. In the present case plaintiffs had not ordered a certain variety of lemons, at least had not done so expressly.

We hold the court did not err in excluding the book of original entries showing sales at auction of lemons in the American Central Fruit Auction from April 1, 1907 to October 5, 1907. Lemons were proved to have a definite market value in Topeka, Kansas, around the dates of defendants' purchases, and it was not necessary to go to another market to ascertain their value. [*Davis v. Railroad*, 122 Mo. App. loc. cit. 644, 90 S. W. 17.] Market conditions might have been very different in St. Louis and have made prices there no criterion of what they were in a place as far distant as Topeka. And especially would sales at auction in St. Louis have too remote a bearing on the issue of market value in Topeka to be admissible.

The judgment is reversed and the cause remanded. All concur.

ANNIE M. POPE-TURNBO, Appellant, v. MAGGIE BEDFORD, Respondent.

St. Louis Court of Appeals, April 5, 1910.

1. **MONOPOLIES: Contracts: Valid and Invalid Provisions: Divisibility.** A contract, by which one party agreed to teach another a method for treating the hair, the latter agreeing to use the former's remedies exclusively, and further agreeing not to mention having learned said method except in connection with the use of said remedies nor to teach said method without having exacted a similar contract from the pupil, consists of separable stipulations, some of which go too far toward restraining trade and favoring monopoly to be enforced, while others are not subject to this objection.
2. ———: ———: **Stipulations Held to be in Restraint of Trade.** The agreement not to use any remedies but those belonging to said party while treating patients by a common method to which said party had no exclusive right was in restraint of trade and fostered monopoly, was unreasonable at common law and in contravention of section 8966, Revised Statutes 1899, there being no limitation in respect of territory or time.
3. **GOOD WILL: Is Species of Property.** The good will of preparations used in treating the hair and system of treatment is a species of property.
4. **CONTRACTS: Negative Covenant: Action Will Lie to Restrain Breach: Equity.** An action in equity will lie to restrain the breach of a negative stipulation in a contract, which is supported by a consideration, if it is not oppressive, opposed to the policy of the law, nor for personal services.
5. ———: ———: ———: ———: **No Irreparable Injury.** There is authority for saying the violation of a negative covenant will be restrained, even though it does not appear irreparable damage will flow from a violation of it, and that an injunction will be granted almost as a matter of course to prevent the breach of such covenants.
6. ———: ———: **Stipulations Held Valid: Breach of Negative Covenants.** Plaintiff agreed to teach defendant a method for treating the hair, the latter agreeing to use the former's remedies exclusively and further agreeing not to mention having learned said method except in connection with the use of said remedies. In an action to restrain the breach of said contract, *held*, the stipulation that defendant should not mention

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having learned plaintiff's method of treatment except in connection with the use of her preparations was enforceable, and that plaintiff could enjoin defendant from advertising herself as plaintiff's pupil after she had ceased to use plaintiff's remedies in treating the hair, under the rule authorizing injunctions to restrain the breach of a negative covenant in a contract.

Appeal from St. Louis City Circuit Court.—*Hon. Jas. E. Withrow*, Judge.

REVERSED AND REMANDED (*with directions*).

Hugh K. Wagner and *M. Hartmann* for appellant.

Howard Sidener and *Rozier Meigs* for respondent.

GOODE, J.—These parties entered into a contract which we transcribe:

"This contract made and entered into this 29th day of August, 1907, by and between Annie M. Pope of the city of St. Louis, State of Missouri, party of the first part, and Mrs. Maggie Bedford, of 3964A Finney avenue, party of the second part, Witnesseth, that:

"Whereas, said Annie M. Pope has knowledge of a certain system or method of treating the scalp and hair, having for its object the production or increase of a growth of hair, which system of treatment said party of the first part has practiced on large numbers of persons for years, and for use in which said party of the first part has adopted certain preparations known as 'Poro' Temple Grower, 'Pope' Hair Grower, 'Poro' Pressing Oil, etc., which said preparations the party of the first part has found by experience to be especially suitable for and adapted to her aforesaid system or method of treatment of the scalp and hair;

"Now, therefore, in consideration of the said party of the first part instructing said party of the second part in said system or method of treatment of the scalp and hair and in the use and application of said 'Poro' remedies and hair applications, said party of the second part hereby agrees as follows:

"1. That the party of the second part will pay to the party of the first part the sum of twenty-five dollars (\$25).

"2. That the party of the second part will not use in the practice of said system or method of scalp or hair treatment so taught the party of the second part by the party of the first part as aforesaid any temple grower, hair grower, pressing oil, or other application or preparation except the above mentioned 'Poro' preparations of the party of the first part, and said party of the second part agrees not to mention having learned the system or method of treatment of the scalp and hair of the party of the first part except in connection with the use by the party of the second part of said 'Poro' preparations of the party of the first part and not in connection with the use of any other hair or scalp applications or treatments; and said party of the second part furthermore agrees that if the party of the second part teaches said system or method of hair and scalp treatment of the party of the first part to any one else, it shall be only after having first obligated any such pupil by a contract similar to the one contained in this paragraph not to practice or mention said treatment of the party of the first part without using said 'Poro' preparations of the party of the first part.

"In testimony Whereof the parties hereto have hereunto affixed their signatures and seals at St. Louis, Missouri, the day and year first aforesaid.

"MRS. MAGGIE BEDFORD (Seal).

"ANNIE M. POPE (Seal).

"Witnesses: Lena Love, Mrs. Octavia A. Rainey."

Plaintiff's name was affixed to the contract as Annie M. Pope, but she testified that since the date of the instrument she had been divorced and resumed, in connection with her name by marriage, her maiden name, Turnbo, and now calls herself Annie M. Pope-Turnbo. Plaintiff taught her system of hair and scalp treatment

to defendant, the tuition extending through about two weeks and defendant paid a fee of twenty-five dollars. The process of treatment was thus described by plaintiff:

"In the beginning you take the hair down and brush it, then we dry clean it; this process means to take the dandruff off the scalp with a brush, then apply soap, massage the hair, then wash the soap out and dry the hair and after that apply Poro Pressing Oil, then when we finish the treatment, we apply Poro Hair Grower to the entire scalp with the use of Poro Temple Grower."

Defendant described plaintiff's process about as the latter did, saying it consisted of nothing but taking a comb, scraping the dandruff off the scalp, washing the hair and pressing it, a process defendant said she had been using four or five years previous to the date of the contract; that if a customer came to her for treatment she scraped the dandruff out, working with a comb, washed the hair and scalp in a tub of water, pressed the hair out and put a little oil on it. Defendant testified she applied to plaintiff to be taught the latter's method, paid twenty-five dollars, and afterwards the contract was presented to her and she signed it without reading, but would not have signed it she had known it bound her to use Poro preparations forever. After receiving a diploma from plaintiff, defendant began to practice at her own home No. 3964A Finney avenue, St. Louis, plaintiff's place of business being No. 2223 Market street. Defendant must have commenced to practice in September, 1907 and she testified she used plaintiff's Poro decoctions until March, 1908, then ceased to use them and instead used her own preparation known as Bedford's Wonderful Hair Grower. On March 21, 1907, defendant inserted this advertisement in a newspaper published in St. Louis and admitted to have a wide circulation:

"Mrs. Bedford, 3964A Finney avenue, is now in business for herself. She was formerly a pupil of Mrs. A. M. Pope, nee Turnbo, and thoroughly understands her business and guarantees all work. She would be pleased to have you give her a call. Telephone, Lindell 2646."

Plaintiff testified her process of treatment of the hair and scalp was a secret one for which she had built up a reputation and it was becoming famous; that plaintiff was known in St. Louis and over the country to cause hair to grow rapidly on people's heads; that the secret of the treatment consisted in the application of the Poro remedies to the hair and scalp. She said these remedies produced a growth of hair as had been proved in many instances; that when defendant applied for instruction, defendant said she was using a treatment different from plaintiff's but wanted to learn the latter's so defendant could "establish herself in business on the same basis." There was testimony to prove the treatment administered by defendant, in the course of which her remedies were used on patients instead of plaintiff's, did not yield a good result. One patient treated by defendant testified the latter said she was doing the same work plaintiff was, and only "used a different soap;" that in connection with the treatment defendant applied to the hair and scalp two remedies called Temple Grower and Bedford's Wonderful Hair Grower. Another witness testified she had taken plaintiff's treatment for three years and had been benefited; that she was nearly bald when she commenced the course and it had improved the growth of her hair.

I. The petition in this case might be considered either a bill in equity to restrain defendant from advertising or saying she had been a pupil of plaintiff and had learned plaintiff's system and method of treatment, unless defendant practiced the same method and treatment, and also to enjoin her from practicing the system with-

out using plaintiff's remedies; or it might be considered as uniting a case at law for damages for breach of the contract with a suit in equity for an injunction. [Paddock v. Somes, 102 Mo. 226, 14 S. W. 746.] The cause was tried without a jury and no declarations of law were asked. The parties appear to treat the case as one in equity for an injunction, and we will dispose of the appeal on the theory that it is. Counsel for plaintiff have discussed in several phases the question of whether the contract is void because in restraint of trade. We think it consists of separable stipulations, some of which go too far toward restraining trade and favoring monopoly, to be enforced, whereas others are not subject to this objection, and it not infrequently happens that contracts are thus divisible. [Oregon Nav. Co. v. Winsor, 87 U. S. 64.] Except the use of the Poro remedies, it is not insisted for plaintiff there was a secret method of peculiar efficacy in her process of treating the hair. Hence defendant in cleansing the scalp of dandruff and washing and oiling the hair, was not making use, contrary to the terms of the contract, of a trade or professional secret belonging to plaintiff. Defendant breached the contract in treating patients, only by using her own remedies instead of plaintiff's as she had agreed to do. But the agreement not to use any remedies but plaintiff's while treating patients by a common method to which plaintiff had no exclusive right, was in restraint of trade and fostered monopoly. It was intended and adapted to prevent the use of any remedy on the hair except plaintiff's, was unlimited in respect of territory or time, was unreasonable at common law, we think, and certainly was in contravention of a statute of this State. [Mallinckrodt Chem. Co. v. Nemnich, 83 Mo. App. 6; Long v. Towl, 42 Mo. 545.] The statute besides other provisions, declares all agreements between persons which tend to lessen full and free competition in the manufacture and sale of any article, product or commodity, and all agreements under

the terms of which it is stipulated, agreed and understood persons doing business in this State shall sell or offer for sale any particular article or commodity and shall not sell or offer for sale any competing commodity, to be against public policy and void. [R. S. 1899, sec. 8966; State ex rel. v. Standard Oil Co., 194 Mo. 124, 91 S. W. 1062.]

II. There is another phase to the case: The petition accuses defendant of telling her patients she had learned her system of treatment from plaintiff, and of advertising herself as plaintiff's pupil after she had ceased to apply the latter's remedies and was applying her own. It is alleged the reputation of plaintiff's business, her method of treating the hair and her preparations were being greatly damaged by said conduct, which constituted a breach of the agreement and worked detriment to plaintiff's business and the reputation she had established for her system, by "imposing responsibility for the harmful, deleterious and inadequate results of the use of said 'Bedford's Wonderful Hair Grower.'" The testimony for plaintiff conduced to prove she had established a good will for her remedies and system of treatment and was enjoying an increasing business. This testimony is uncontradicted and must be accepted as true. The good will of her preparations and system of treatment is a species of property. [14 Ency. Law (2 Ed.), 1086; Beebe v. Hatfield, 67 Mo. App. 609; Met. Nat'l Bank v. Dispatch Co., 36 Fed. 722.] It was of value to plaintiff and she had the right to protect it from unfair competition by inserting a restrictive stipulation in contracts made with pupils to prevent them from leading the public to believe they applied plaintiff's remedies when, in fact, they applied others less efficacious. [Goodyear, etc., Co. v. Rubber Co., 128 U. S. 598; Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S. 537; Hopkins on Unfair Trade, section 12 and notes.] Probably she would have the same right in the absence

of such a stipulation, but as to that we need not inquire. In view of the restriction it was unfair for defendant to advertise herself, either verbally or in the press, as having been a pupil of plaintiff, thereby giving the impression she administered plaintiff's system of treatment after she had ceased to do this. In this respect the case strikes us as simply one to restrain the breach of a negative stipulation in a contract; a relief readily granted in equity if the stipulation is supported by a consideration, and is not oppressive, opposed to the policy of the law nor for personal services. Those conditions of relief exist in the present case, and this further one, too, if it is essential: The damages plaintiff would suffer from breaches of the stipulation are not recoverable in a legal action because they cannot be measured. [Beekman v. Marsters, 11 L. R. A. (n. s.) 201.] There is authority for saying the violation of a negative covenant inserted in a contract to protect property will be restrained even though it does not appear irreparable damage will flow from a violation of it. [Schlitz Brew. Ass'n v. Neilsen, 8 L. R. A. (n. s.) 494; Dickerson v. Canal Co., 15 Beav. 260; Huline v. Shreve, 4 N. J. Eq. 116.] Commentators say injunctions are granted almost as a matter of course to prevent the breach of such covenants. [3 Pomeroy, Eq. Jur., section 1342; see, too, 2 High. Injunctions, section 1142.] Those writers refer to the restraint of breaches of negative covenants in leases, but we do not see any reason why the principle does not apply to the stipulation in question. Plaintiff considered it would be detrimental to the good will of her method of treatment and remedies to have persons who had studied under her as pupils advertise that fact after they had commenced to practice, unless they used plaintiff's remedies; and this opinion stood on solid ground, if, as she testified, the beneficial part of her system consisted in applying the Poro remedies to the scalp. The use of remedies which lacked their virtue, would impair their reputation and diminish the value

of plaintiff's good will. We have no doubt the contract ought to be enforced to this extent and find abundant authority for our conclusion in the text of sections 1342 to 1344 inclusive, of 3 Pomeroy, Eq. Jur., and cases cited in the notes. See, too, *Hall v. Wester*, 7 Mo. App. 56; *St. Louis Safe Dep. & Sav. Bank v. Kennett*, 101 Mo. App. 370, 389, 74 S. W. 474; *Manhattan Mfg. Co. v. Stock Yards*, 23 N. J. Eq. 161.

The judgment entered below dismissing plaintiff's bill and denying any relief by injunction will be reversed and the cause will be remanded with directions to enter judgment that defendant be enjoined from mentioning to patients she had learned from plaintiff the latter's method of treatment of the scalp and hair, and from advertising herself as the former's pupil unless she uses plaintiff's Poro preparations instead of her own in treating patients; and that the costs of this action be taxed against the defendant. All concur.

**NEEDHAM C. COLLIER, Respondent, v. LANGAN &
TAYLOR STORAGE & MOVING COMPANY, Ap-
pellant.**

St. Louis Court of Appeals. Argued and Submitted March 10, 1910. Opinion Filed April 5, 1910.

1. **TRIAL PRACTICE: Improper Argument of Counsel: Retraction.** Where, in an action for loss of goods by fire, on objection to the argument of plaintiff's counsel to the effect that plaintiff showed defendant took the goods away and burned them up, the court stated there was no evidence that the goods were burned up by defendant, and counsel retracted his statement, such statement, though improper, because outside of the evidence, is not ground for reversal.
2. **WITNESSES: Husband and Wife: Agency of Wife.** Where a husband called up a corporation engaged in the business of moving household goods, and asked its representative to come to his house and arrange with his wife for the moving of

his goods, the wife as the agent of the husband was competent to testify as to the arrangement made with the corporation for the moving of the goods, and the incidents connected therewith.

3. **TRIAL PRACTICE: Discretion of Court: Evidence: Refreshing Memory from Memorandum.** The action of the trial court in allowing a witness to refresh his memory from memoranda made sometime after the happening of the events in issue is within its discretion, and its rulings will not be disturbed unless the discretion was abused.
4. **COMMON CARRIERS: Who Are: Question of Law or Fact.** It is a question of law for the court to determine as to what constitutes a common carrier, but it is a question of fact for the jury to determine whether the person charged as a common carrier is within that definition and is carrying on his business in that capacity.
5. **WAREHOUSEMAN: Liability of: Destruction of Goods by Fire.** A warehouseman is not liable for the destruction of goods by fire not due to his negligence or that of his agents in the course of their employment, where due diligence has been exercised for the safety of such goods, and the burden of showing negligence of the warehouseman is always on plaintiff; but it is sufficient for plaintiff to show delivery of the goods in good condition and their return in a damaged state, from which facts the law declares a prima facie case of negligence is made out.
6. **PRIVATE CARRIERS: Liability.** A private carrier with or without a reward is only a bailee, and his liability is determined by the rules governing the responsibility of bailees.
7. **COMMON CARRIERS: Who Are.** A "common carrier" is one who undertakes for hire to transport the goods of such as choose to employ him, and ordinarily carters and expressmen engaged in carrying freight to and from a depot or warehouse, or between places in the same locality, or between different localities, are common carriers.
8. **———: ———: Liability: Limiting Employment.** The fact that one engaged in the carriage of goods may have limited his employment to the carriage of household goods only does not change his position as a common carrier, for the employment may be limited to the mere carriage of particular kinds of property, and when this is shown and is a known and avowed fact, such person will not be liable as a common carrier for any other goods or property entrusted to his agent without his consent; but he will be liable as a common carrier for the loss of those goods, in the carriage and moving of which he is engaged as a regular business.

9. ———: Warehouseman: Liability. A common carrier may be a warehouseman, and when acting as such its liability is that of a warehouseman and not that of a common carrier.
10. BAILMENT: Loss of Goods: Burden of Proof. A bailee for hire, who fails to deliver goods received by him, has the burden of excusing the non-delivery.
11. COMMON CARRIERS: Negligence: Destruction of Goods by Fire: Evidence Sufficient to Prove Negligence. In an action against a common carrier of household goods for loss of goods by fire while in its custody, evidence that the driver of a moving van in which said goods were being transported was told there was a fire in the van but that he paid no attention to it until when, sometime afterwards, he looked around and discovered the fire, was sufficient to warrant the jury in inferring defendant was guilty of negligence resulting in the loss.
12. ———: Who Are: Liability of: Destruction of Goods by Fire. One holding himself out as engaged in the general business of moving household goods from one residence to another in a city, for all who choose to employ him, is a "common carrier," and is an insurer against all losses save these due to the act of God, or the public enemy, and a fire destroying goods in his possession is an accident against which he insures, unless it is the result of lightning.
13. ———: Destruction of Goods by Fire: Instructions: Making Defendant Liable as Bailee: Harmless Error. A common carrier of household goods sued for loss of goods by fire while in its custody as carrier may not complain of instructions limiting its liability to the liability of a bailee for hire, where the jury could find that its negligence caused the loss, and where the uncontradicted evidence showed its liability as a common carrier, whether it was negligent or not.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

AFFIRMED.

John S. Leahy and *Alfred Kehde* for appellant.

(1) The defendant was a private and not a common carrier. *Faucher v. Wilson*, 68 N. H. 338 and cases cited; *Mfg. Co. v. Railroad*, 19 S. C. 353; *Fish v. Chapman*, 2 Ga. 349; *Thompson v. Storage Co.*, 97 Mo. App. 135; *Jaminet v. Storage & Moving Co.*, 109 Mo. App. 269.

(2) The court should have given the instruction in the nature of a demurrer requested by defendant at the close of all the evidence. *Berger v. Storage & Com. Co.*, 136 Mo. App. 42; *Jaminet v. Storage & Moving Co.*, 109 Mo. App. 264. (3) Plaintiff's wife was an incompetent witness to prove the value of the articles destroyed. *Flannery v. Railroad*, 44 Mo. App. 398. (4) It was error to permit plaintiff's wife to refresh her memory from a memorandum made some time after the happening of the events charged in the petition. *Steinkeller v. Newton*, 9 Carr & P. 313; *Jones v. Shroud*, 2 Carr & P. 196; *The People v. Cotta*, 48 Cal. 168; *Philbin v. Patrick*, 3 App. (N. Y.) 605; *Folsom v. Appel River Co.*, 41 Wis. 602; *Kelsea v. Fletcher*, 48 N. H. 282; *Haven v. Wendell*, 11 N. H. 112; *Cowles v. State*, 50 Ala. 454; *Jones v. Johns*, Fed. Cas. 7471; *Railroad v. Casswry*, 109 Ala. 697. (5) Defendant was a bailee for hire, and responsible only for losses occasioned by his or his servant's negligence. *Berger v. Storage & C. Co.*, 136 Mo. App. 36; *Casey v. Donovan*, 65 Mo. App. 521; *Thompson v. Storage Co.*, 97 Mo. App. 135; *Jaminet v. Storage & Moving Co.*, 109 Mo. App. 269. (6) Improper conduct of plaintiff's counsel is reversible error. *Bishop v. Hunt*, 24 App. 377; *Riley v. Railroad*, 68 Mo. App. 652; *Fathman v. Tumlity*, 34 Mo. App. 236; *Evans v. Town of Trenton*, 112 Mo. 390.

Brownrigg & Mason for respondent.

(1) Under the pleadings and proof, the defendant was a common carrier. *Lawson on Bailments*, pp. 141, 143; 6 Am. and Eng. Ency. Law (2 Ed.), p. 237; *Hutchinson on Carriers* (2 Ed.), sec. 47, footnote, also sec. 59; 6 Am. and Eng. Ency. Law (2 Ed.), p. 252; *Lloyd v. Storage & Transfer Co.*, 72 Atl. 516; *Jackson, etc., Works v. Hurlburt*, 158 N. Y. 34; *Hohl v. Laux*, 93 S. W. Tex. Civ. App. 1080; *Farley v. Lavary*, 107 Ky. 523. (2) All questions as to the competency of

plaintiff's wife were waived by defendant as pointed out in the statement. (3) The testimony of plaintiff's wife was clearly competent under section 4656 of the Revised Statutes of Missouri, 1899, both because it was testimony against a carrier and because she was testifying as to a matter in which she had acted as her husband's agent. (4) Whether defendant was a common carrier or an ordinary bailee, plaintiff established his case against the appellant by merely showing delivery of the goods and their return in damaged condition. *Berger v. Storage and Moving Co.*, 136 Mo. App. 40; *Arnot v. Branconier*, 14 Mo. App. 434; *Horton v. Terminal Hotel Co.*, 114 Mo. App. 357.

STATEMENT.—It is stated in the petition in this case upon which it was tried, that the defendant is a corporation located in the city of St. Louis, and as such held itself out to the public as and was on the date named engaged in conducting a general moving and wagon express business for hire; that on the date named it undertook and agreed for hire and reward, then and there promised by plaintiff to be paid, to load upon its vans, moving and express wagons, the household goods, clothing, trunks, chattels and effects of plaintiff, contained and then being in the residence of plaintiff in a house on Delmar avenue in that city, and transport and carry the goods, etc., by its vans, etc., along the streets of that city and redeliver them to plaintiff at the residence to which he was moving on Cleveland avenue, some two miles or more distant from the starting point. In pursuance of the undertaking and agreement the defendant, on the day named, loaded into its vans, etc., the goods and chattels, etc., at the starting point for the purpose of carrying them to the new residence and there to redeliver them to plaintiff; that defendant by its servants and agents so negligently and carelessly conducted itself in the handling, loading and carrying of the goods, that while they were in the sole care and custody of defendant

and were being carried by it in its vans, a great part of the goods, etc., were lost, damaged, etc., and destroyed by fire as a direct result of the negligence of the defendant. An itemized list of the articles damaged and destroyed, with their value, is incorporated in the petition, damages in the sum of \$410.25 being claimed with interest thereon at the rate of 6 per cent per annum from the 31st of March, which was the date of the transaction, to date of judgment.

The answer, after averring that defendant "denies each and every allegation in plaintiff's said petition contained, except the averments specially admitted therein," by way of further answer sets up that "defendant was employed to remove and convey the furniture of plaintiff, as alleged in the petition; that defendant is engaged in the moving business; that at the time alleged in the petition, defendant had the latest and most modern and approved vans to cart and move furniture; that defendant used them for moving the furniture and detailed for the manual labor necessary in moving it, men experienced in the moving and transporting of furniture; that all of plaintiff's furniture was carefully and securely placed in the van of defendant and that all the care and precaution that was usual in the moving of furniture was taken and made use of by the defendant in moving plaintiff's furniture; that neither defendant nor any of its agents caused the fire which burned or destroyed any of plaintiff's furniture; that the fire, if any, which destroyed plaintiff's furniture while it was being hauled or carted in the moving vans of defendant "was caused by persons other than those in the employ of defendant, and was an occurrence over which defendant had no control, and that it could not, by reason of its long experience in the moving and hauling businesss, have foreseen or expected such a happening, and was the result of no carelessness or negligence on the part of this defendant."

The reply was a general denial.

At a trial before the court and jury, plaintiff, introduced as a witness on his own behalf, stated that the defendant was engaged in the general moving and storage business, that is, in moving household furniture from one residence to another; moved furniture from one residence to another; was in the general moving and storage business, as he understood, moving from one residence to another any one that desired to employ it. That a day or two prior to the moving day, plaintiff called up the company and asked its representative to come to plaintiff's house and arrange with his wife as to the moving of the furniture. He himself made no arrangement or agreement with defendant as to prices. He was present when the goods were loaded into the vans; the goods when loaded were in good condition, save usual wear and tear of furniture, incident to use in any household. Some of it had been in use for considerable time, other of it was comparatively new. Two vans, loaded with the furniture and household effects, started from the Delmar avenue residence of plaintiff and he took a street car and went to the Cleveland avenue place to be there when the goods arrived. One of the vans came as far as Cleveland and Tower Grove avenues, and he saw it standing there while he was on the porch of the Cleveland avenue house. There was no driver on the seat. Plaintiff went to the corner of Tower Grove and Cleveland avenues to ascertain what the trouble was about, why the van was not proceeding any further. The other van was one or two streets north of Cleveland avenue. Plaintiff went to where it was and saw there was a fire in that van that was destroying some of the furniture in it. When he arrived there the goods were being taken out of that van. A long examination then took place as to the value of the goods destroyed or damaged, the effect of it being that plaintiff and his wife had made out a list together of the damage and that they estimated the loss at the amount stated

in the petition, the load consisting of furniture, wearing apparel and usual household effects of a family. Some of the stuff was burned entirely and some damaged; some of the damage was occasioned by the fire itself and other by the hasty manner in which the goods were taken out of the van; some small articles were lost. Asked to state particularly what sort of goods defendant was engaged in hauling and moving, he answered, "Household goods, such as one person moves from one place in the city to another." A protracted cross-examination followed, mainly directed to the value of the goods and to the plaintiff's knowledge of the value, and as to how a certain memorandum had been made up from which the list embodied in the petition had been taken. The vans used were large moving vans, such as he had seen around the city; supposed the men who carried the furniture down and loaded it in the vans did so in the usual way; all that he knows about that was that he saw them putting the furniture in the wagon; saw them tying the tail gate up and the van seemed full and they drove off; thought they knew how to load the wagon. Asked if he claimed that defendant's agents were guilty of negligence in loading, witness answered, that he didn't know anything about that. On recross-examination plaintiff described more particularly the condition of the household furniture and effects.

Plaintiff's wife was then offered as a witness and she was asked what passed between her and the defendant company with reference to the moving of these goods. She testified that the representative of the company called at the house; that Mr. Collier, the plaintiff, had called him up, asked him to come and speak to her about moving the furniture; she carried him over the house and showed him what was to be moved and he agreed to move all for the sum of from eighteen dollars to twenty dollars; he agreed to move everything that was in the house; doesn't remember that anything further passed between them; nothing was said about how the

things should be prepared; the only arrangement was that he would move them on a certain day from Delmar avenue to Cleveland avenue, and further than that witness doesn't think anything was said. When he made the price she agreed to it. Witness was then handed the list of the goods moved, as they are enumerated in the petition and asked what defendant had done with reference to moving the goods. This was objected to by counsel for defendant on the ground of the statute, which counsel claimed makes the witness disqualified on behalf of her husband; that according to the testimony of her husband, he had called the defendant by telephone and told him to call at his residence and that his wife would instruct defendant what to do, made her competent to testify what arrangements she had made as his agent, but that in going on and testifying as to the value of the property and as to what happened to it thereafter, she came within the statutory disqualification; that she had a specific agency merely to employ the defendant but had no agency to appraise what was burned or to make out the memorandum showing it. Asked by the court if he did not think the agency of the wife extended to anything that might be necessary to be done in connection with the moving of the goods or that might occur in connection therewith, counsel answered that he did not think so. The court asked counsel why, and counsel replied, "I think if she is going to act as appraiser—" and the court replied, "Which grows out of the deal—" to which counsel for defendant replied that to save time he would save an exception. Whereupon Mrs. Collier proceeded to testify that on the morning of the moving the representative of defendant came there and commenced moving and taking down the furniture and other household goods and, proceeding to go into details, stated that the goods were carried into the vans and loaded and carried from the Delmar to the Cleveland avenue house. She remained at the Delmar avenue residence while her husband was at the

Cleveland avenue house. She remained at the Delmar avenue house until the last van had left the house. Defendant took everything of any value out of the house that it was desired to have moved. All the goods set out in the petition were moved out of the house by the defendant. The furniture was in good condition that had been loaded in two of the vans. The furniture that was in the third van was almost entirely destroyed. This third van contained the greater part of the bedroom furniture and the stoves, and most of the furniture that was on the third floor of the house was in the van that was destroyed; it was delivered to the defendant and never received by plaintiff. Witness testified that she was familiar with the price of the articles from having purchased most of them herself and having known the purchase price at the time of the purchase, and from purchasing similar articles in St. Louis. She testified to the values as being those set out in the petition.

Another witness testified on behalf of plaintiff as to the value of the goods that he was shown that belonged to the plaintiff, and testified in particular as to the value of a walnut bedstead and walnut furniture included in the list, placing it in the neighborhood of a couple of hundred dollars.

Mrs. Collier, being recalled as a witness, was being examined as to the items in the list contained in the petition in detail, and counsel for the defendant made this statement:

"I think we can expedite this matter, Your Honor. I will be willing to admit—there is some divergence or difference here, or will be in some particulars—but she has pretty well kept to the text, it seems. I am willing to admit she will testify that these various items—we have only gotten half way down this page, and we have that half and another half to cover—and I am willing to admit that the lady will testify that the various items set out in this petition are reasonably worth the amounts opposite their names, at the time they were burned."

Counsel for defendant further admitted that this witness would testify that the damage on those of the goods not destroyed is fully the amount of that set out in the petition; that the estimates are reasonable and that Mrs. Collier will testify that they are reasonable. She further testified in answer to the question as to whether she had gone over the list of goods, endeavoring to arrive at a fair and reasonable estimate of their value, that she certainly did; that in almost every case they gave defendant "the benefit of the doubt." This was objected to by defendant's counsel, who moved that it be stricken out. The court overruled the objection and permitted it to stand, defendant excepting. Mrs. Collier also testified that she objected to the men carrying out and loading a stove that was put in the third van because it had not been cleaned out. On cross-examination, defendant's counsel asked this witness if the men who were then handling the goods that belonged to her and putting them in the wagon seemed to be experienced men. On being objected to, that she had not qualified as an expert, counsel for defendant then asked her if she had frequently moved in St. Louis. She said she had moved four times since 1899, when they came to St. Louis, and had seen the way men handle furniture taking it out and putting it in the wagons; didn't know that she had paid any particular attention to them, except in the instance of the moving of a stove at the time in controversy, when she happened to be in the room and suggested that when they were moving it it ought to be cleaned out first. Counsel for defendant then cross-examined her as to the time in the morning when the defendant's men started to load up the goods, the exact time when they left with the first load; that her husband had gone from the Delmar avenue residence before the wagons left and before he had his lunch and that she had had her lunch that day about three o'clock in the afternoon.

This is substantially all the evidence for plaintiff and it its close the defendant asked the court to instruct the jury that under the law and the evidence their verdict must be for the defendant. This was refused and defendant duly excepted.

On behalf of the defense the president of the company testified that he knew nothing about the burning of the goods in the van, as the only one that he saw after the accident was the one that was burned. This van, like the other in use, was a closed van, with roof, and padded on the inside, of the most up-to-date pattern and style; examined the furniture after it was burned and damaged; saw what had not been destroyed entirely; what he saw that was damaged he estimated to be damaged to the extent of about \$100; did not know how the fire occurred.

One of the men employed in moving the furniture was examined and testified that he had taken part in the moving from the Delmar to Cleveland avenue residence; had been in the business of helper in moving for nine years; the van so employed was of the best type of such vehicles; the furniture and household goods had all been loaded in properly without injury, except one bed was pretty well smashed up; all he knew about the fire was that they got down to Tower Grove avenue and this van was on fire. Witness was in front with his van and somebody hallooed to him that the van behind him was on fire and he and his helper got off and ran back and did what they could to save the things. He and another man were on the first van and two men were on the second, the one on which the fire occurred. When he and his helper got to the van which was on fire, they tried to unloosen the rope of the tail gate but the van was full of smoke. They took all they could off the tail gate to save it and when they opened the door the flames of the fire burst right out and they could not do anything more; turned on a fire alarm and the fire engines came and the fire-

men jumped into the van and commenced trying to put the fire out; had commenced loading the furniture in the vans about 7 o'clock and finished at about 12 and started right off for the Cleveland avenue residence; took about an hour to drive from the Delmar avenue residence to the place where the fire begun. The first van loaded was the one that caught fire. The loading of that had been finished about half past eight or nine and it stood there at the Delmar avenue residence until the other van was loaded.

One of the helpers of the defendant testified that he had helped carry the furniture down and load it into the vans. The wagon with which he was connected was the one that caught fire; that wagon had been loaded before the other one and pulled aside and then they loaded the other wagon and about 10 o'clock or later started together to the Cleveland avenue house.

When they reached Tower Grove Station he drove across the tracks and got up to Tower Grove avenue and a street car man told him his load was afire. Witness said he did not pay much attention at first and drove a little further and then got down and looked and there was a fire on the rear of his wagon; hallooed to the other boys to come back; they cut the ropes to save what they could on the gate of the wagon and when they knocked the door of the wagon open, the flames came and they could not do anything more; rang up the fire department and it came and put out the fire. Asked what caused the fire, said he was not able to say and did not know. There was a partition in the wagon between the driver's seat and the body of the wagon; had to get down off the seat and go to the rear of the wagon to see about the fire. The wagon was an up-to-date van, one of the new padded vans; brought all the furniture down when loading with care, as they always did, and delivered it with care and placed it in the wagon.

Another witness, a brother of the president of the company, testified on behalf of defendant that he was

in the office when they heard of the wagon being on fire and went to see what the trouble was. When he got there found part of the furniture, such as had been loaded on the tail gate of the wagon, had been taken off and the top of the van burned out and the fire department had been there throwing water on it; that part of the furniture which was on the tail gate was taken off, that was not damaged; a little over a third of the load, witness said, he should say, of that part inside of the van was damaged; some of the furniture was nearly all burned and the other part of it badly damaged; did not know how the fire occurred and the van was one of the company's largest padded vans, a closed van and the latest type of a moving van. This is all the testimony in the case. At its close defendant requested the court to instruct the jury that under the law and the evidence they should find for defendant. This was refused, defendant excepting.

At plaintiff's request the court instructed the jury, in substance, that if they found from the evidence that defendant agreed to carry plaintiff's goods for hire, and that plaintiff's goods were delivered to the defendant in good condition and were either destroyed or damaged when in possession or custody of the defendant, defendant cannot excuse itself from liability by merely showing that the goods were carefully packed and that it used suitable conveyances for transporting the same and employed careful and competent men to handle the same, but in order to relieve the defendant from liability for the loss or damage of the goods as aforesaid, the jury must believe from the evidence that the loss or damage occurred without negligence on the part of defendant or its agents or servants. The jury were further told that if they found for plaintiff they should assess his damages at such sum as they believed from the evidence would reasonably compensate him for the loss or damage of his goods and chattels. The court also, at its own motion, gave the usual formal instruction as to

the number of jurors necessary to find a verdict. Defendant duly excepted to the giving of these instructions, except as to the last, and on its part asked an instruction that unless the jury found and believed from the evidence that the damage of which plaintiff complains was caused by the negligence of defendant or its servants, the verdict must be for the defendant; that defendant is a bailee for hire and is only responsible for loss caused by its own or its servants' negligence and that the burthen of proof was on the plaintiff to show, by a preponderance of evidence that the damage for which he brought this action was caused by the negligence of the defendant or its servants. The court gave these instructions but refused instructions asked by the defendant, to the effect that it is not sufficient for plaintiff to show that he employed defendant, that the injury occurred and that the damage resulted, but that plaintiff must further show that defendant was guilty of some particular act of negligence before the jury can find for plaintiff, the presumption being in favor of the defendant unless it is established by positive evidence that the moving company committed some act of negligence; that the defendant is not a common carrier but a private carrier or a bailee for hire and is not an insurer; that a common carrier is responsible for any loss except such as may be entailed by the act of God or a public enemy, but a private carrier, one like the defendant, who is a bailee for hire, is not liable or responsible unless it is shown from the evidence that he has committed some act of negligence, either done something that he should not have done or omitted to do something that he should have done, and from the evidence the jury are instructed that there is no warranty on the part of defendant that he would deliver the goods in any particular condition and unless they found from the evidence some specific or particular act of negligence on the part of defendant, their verdict must be for the defendant.

During the course of the argument counsel for plaintiff, in addressing the jury, said: "When we show that they took them (the goods) away and burned them up—" Counsel for defendant objected, saying that there was no evidence that defendant had burned them up. The court said: "No, there is no evidence that they were burned up by the defendant. . . . The evidence shows they were burned." Counsel for defendant noted an exception to the statement of counsel for plaintiff and asked the court to reprove him, to which the court answered that that had already been done; that he had called the attention of counsel to the fact that there is no evidence that they were burned by the defendant. Counsel for plaintiff then said: "Of course, I don't mean to be unfair. I imagine it might have happened in a dozen different ways."

The jury returned a verdict for plaintiff for \$418.25, with interest to date. Being sent back by the court to correct their verdict, they returned into court a verdict for plaintiff for \$492.14. In due time defendant filed its motion for new trial which was overruled, defendant duly excepting, and afterwards plaintiff remitted \$73.89 of the judgment, that being the interest to which plaintiff, on argument before us, stated they did not think they were entitled, leaving the judgment stand for the sum of \$418.25. In due time defendant appealed to this court.

REYNOLDS, P. J. (after stating the facts).—The assignments of error in this court by the learned counsel for defendant are, first, that the defendant was a private and not a common carrier; that it was a bailee for hire and responsible only for loss occasioned by its servants' negligence; second, that the court should have given the instruction in the nature of a demurrer, requested by defendant at the close of all the evidence; third, that plaintiff's wife was an incompetent witness

to prove the value of the articles destroyed and that it was error to permit her to refresh her memory from a memorandum made sometime after the happening of the events charged in the petition and, finally, that the improper conduct of plaintiff's counsel is reversible error. Disposing of the minor propositions before taking up the more serious and important ones, we hold that the language of counsel which was objected and excepted to, while improper in that it stated as a fact in the case that which had not been proven, was not only retracted by counsel but the counsel was properly corrected by the court. Under the facts in evidence in the case as to the agency of the wife, we think she was a competent witness for all of the transactions and incidents connected therewith to which this agency related. Nor do we think there was any error in the action of the court in allowing her to refresh her memory from the memorandum made sometime after the happening of the events charged in the petition. This latter matter is so much in the discretion of the trial court, the witnesses being before him and he having such full and ample opportunity to pass on the question of the use of memoranda by a witness, that except in a case manifestly showing an abuse of this discretion, the appellate court will not interfere.

This brings us to the important errors assigned, namely, as to whether a demurrer to the evidence, interposed by the defendant, should have been given and with that is the question as to whether the defendant was a private and not a common carrier. These two assignments run together so intimately that we will dispose of them together.

At the outset it is to be remarked that the instructions given at the instance of plaintiff are not correct on the theory which we think should have governed in the determination of this case. The error in them, however, is entirely against the plaintiff and is of such a character as not to constitute reversible error, if the

theory upon which the appellant, defendant below, argues this case before us is the correct theory. It is fair to say that counsel for the respondent has very frankly accepted the issue presented by the defendant in the assignment of errors made before us and that both counsel in the oral argument of the case before the court, placed the case upon the theory that involved the determination of the question as to whether the defendant was or was not a common carrier. If defendant was a carrier for hire, the demurrer to the evidence would demand more serious consideration. If it was a common carrier, there is nothing to be said in support of that demurrer.

The learned counsel for the defendant claim that this court has held, in several well considered decisions, that a person or corporation, who undertakes to move household goods from one residence to another in a city, is not a common carrier but a private carrier for hire, and is responsible only for loss occasioned either by its own or its servants' negligence. In support of this counsel cite the cases of *Jaminet v. American Storage & Moving Co.*, 109 Mo. App. 257, 84 S. W. 128; *Berger v. St. Louis Storage & Commission Co.*, 136 Mo. App. 36, 116 S. W. 444, and *Thompson v. New York Storage Co.*, 97 Mo. App. 135, 70 S. W. 938. An examination of these cases does not sustain the claim of counsel.

In *Thompson v. New York Storage Co.*, supra, Judge GOODE, who delivered the opinion, states (l. c. 136) that, "The testimony in the case is meager but we think appellant was a private carrier or ordinary bailee for hire, not bound to serve every one without discrimination. . . . Whether a person was a common carrier, bound by all the extraordinary responsibilities and entitled to the privileges of that class of bailees, can sometimes be known only by particular proof of how his business was conducted and what professions he made to the public regarding it. . . . As

no declarations of law were asked on the subject, and as what testimony there is inclines us to look on appellant as a private carrier instead of refuting any possible inference of that kind, we will not interfere with the finding of the court below." The decision then is that the defendant being a private and not a common carrier, which latter it contended it was, was not entitled to a lien for its charges upon the goods which it had carried. This decision is in line with all the authorities which are to the effect that it is a question of law for the court to determine as to what constitutes a common carrier, but it is a question of fact for the jury to determine whether the defendant charged as a common carrier is within that definition and is carrying on his business in that capacity. Thus in *Pennewill v. Cullen*, 5 Harr. Rep. (Del.) 238, l. c. 241, it is said that it is for the jury to determine upon the proof, whether the defendant held himself out to the public as engaged in the business of a common carrier. See also 6 Am. and Eng. Ency. (2 Ed.), p. 247.

All that is held in the *Thompson* case, therefore, is, that under the facts in that case, as shown in it, and in the absence of any declarations of law or instructions, this court would not disturb or interfere with the finding of the court below in holding that that defendant was not a common carrier. It is not, in our opinion, a determination of the question here involved.

The case of *Jaminet v. American Storage & Moving Co.*, supra, was an action against the defendant for the destruction of a mirror and the partial destruction of a portrait of the plaintiff which had been unloaded from a van in which they had been carried, while the defendant was moving the plaintiff's household goods from one point of the city of St. Louis to another point in the same city. At page 262, Judge GOODE, who delivered the opinion of this court, says: "The chief contention of the appellant's counsel is that the court erred in assuming the appellant was a com-

mon carrier, instead of leaving it to the jury to say. This point is irrelevant; for the instructions did not make the appellant's liability depend upon its possessing the character and responsibility of a common carrier, but on finding that it had agreed with respondent, for a consideration, well and safely to move and carry respondent's household furniture and goods, and to deliver them to her in as good condition as when received. As the case is presented here it is immaterial whether the appellant was a common carrier or not." It therefore appears that whatever may have been said in the course of the very learned and elaborate discussion of the law applicable to the case of a special contract, as was in the *Jamnet* case, the point in decision was most distinctly on ground other than the determination of the question of what constitutes a common carrier, and that decision cannot be held to be a determination of that question. It follows also that as the law as to common carriers was not before the court in that case, and it was a case of the construction of a special contract, there was no consideration given of the question as to whether, if the defendant in that case had been held to be a common carrier, it could by special contract exempt itself from the liabilities of a common carrier. In the case at bar there is no question of a special contract before us, so that we are not in any degree passing on the law applicable to such a situation as might arise if a special contract were relied upon.

Berger v. St. Louis Storage & Commission Co., *supra*, was an action for the value of several carpets lost to plaintiff and for damages alleged to have accrued to numerous articles of furniture, while stored in the defendant's warehouse. Evidently, therefore, it can have no application whatever to the determination of the question of the liability of the defendant in that case as a common carrier. Its liability was that of a warehouseman, whose duty in the protection and care of property entrusted to him is to use ordinary care, such

care and diligence as an ordinarily prudent person, in that line of business, is accustomed to exercise toward such property or in the care of his own property under similar circumstances, the general rule being that the warehouseman is not liable for the destruction of goods by fire not due to his negligence or that of his agents in the course of their employment, where due diligence has been exercised for their safety, and the burthen of showing negligence of the warehouseman or his agents is always on plaintiff, but it is sufficient in the case of a warehouseman for plaintiff to show delivery of the goods in good condition and their return in a damaged state; from these facts the law declares a prima facie case of negligence is made out. [Berger v. St. Louis Storage & Commission Co., 136 Mo. App. 36, 1. c. 40, 116 S. W. 444; 30 Am. and Eng. Ency. (2 Ed.), p. 46, par. 2; p. 48, par. 3, and cases cited in note.] It is very evident, therefore, that the decisions in none of these cases above cited, and they are the only cases cited by counsel from our own State reports, bear on the proposition determining the question here presented. The question here presented for our determination, therefore, may be regarded as an original one and one of first impression in the appellate courts of this State. That question is whether a person or corporation, engaged in the business that this defendant is shown to have been engaged in, was a private carrier for hire or a common carrier. The law relating to common carriers as distinguished from private carriers is so thoroughly known to the profession that we can add nothing of service by undertaking to go into it. By way of having it clearly before us, however, we venture to refer to 1 Hutchinson on Carriers (3 Ed.), where at sec. 4, p. 3, it is said that while private carriers, whether with or without reward, are strictly bailees and nothing more, and that questions as to their liability are to be determined by the ordinary rules which govern the responsibility of bailees, the common carrier of goods

stands upon an entirely different footing, and when questions as to his liability for the loss of the goods or their injury while in his custody for the purpose of carriage arise, they must be decided upon principles peculiarly applicable to them and which have no application to any other kind of bailment except that to the innkeeper by his guest. The question of negligence, when the purely common law relation of the common carrier to the goods exists, is ordinarily wholly foreign to the inquiry whether such a carrier is to be held liable for their loss or injury, and evidence on his part of the most exact diligence will be wholly irrelevant and inadmissible. "If, for example," says Mr. Hutchinson, "the private carrier or any other ordinary bailee be robbed of the goods, or if they should be accidentally destroyed by fire or any other calamity, without negligence on his part, the law will excuse him;" but if they should be destroyed by fire ever so unavoidable, while in the custody of a common carrier, he will nevertheless be liable for them. He is an insurer of the goods against all losses, except those caused by the act of God, the public enemy, the law, the owner or the inherent nature of the goods. This is so well recognized a doctrine of the law relating to the two classes of carriers that it would seem almost superfluous to quote or cite authorities in its support. In support of this Hutchinson cites and quotes Mr. Justice Story (Story on Bailments, sec. 495), to the effect that to bring a person or a company within the definition of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*. A common carrier has, therefore, been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place.

Story on Bailments (9 Ed.), chap. 6, p. 466, par. 496, includes among common carriers, truckmen, wagoners, teamsters, cartmen and porters, "who undertake to carry goods for hire, as a common employment, from one town to another, or from one part of a town or city to another."

Says Chancellor Kent, 2 Kent (14 Ed.), *p. 599, "common carriers are those who undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods, and deliver them at a place appointed, for hire as a business, and with or without a special agreement as to price;" and he enumerates among those adjudged to be common carriers, wagoners, teamsters, cartmen and porters.

Ordinarily, carters and expressmen engaged in carrying freight to and from a depot or warehouse, or between places in the same locality, or between different localities, are common carriers and liable as such. [6 Am. and Eng. Ency. (2 Ed.), sec. 3, p. 251, and cases in notes.]

At section 68 of his work, in defining who are common carriers, Hutchinson enumerates the proprietors of "land vehicles of every kind, such as stage and hackney coaches, omnibuses, cabs, drays, carts, wagons, sleds and street cars, who make it a business to carry for hire the goods of such as choose to employ them, even though it may be within the limits of the same town or city, are reckoned as common carriers and held liable as such." Again at section 70, it is said that the "proprietors of land vehicles which are not employed upon any regular line of transportation, but are used exclusively for the carriage of the goods of others for hire to places in the same town, city or neighborhood to which the owners of such goods may desire them to be conveyed, and who may be said to engage in a sort of jobbing business as carriers, such as drays, carts, express or delivery wagons, sleds and trucks, are accord-

ing to a number of authorities in this country, strictly common carriers as to such goods."

Among other cases cited by the author in support of this, is that of *Jackson Architectural Iron Works v. Hurlburt et al.*, 158 N. Y. 34, affirming the decision of the Court of Common Pleas hereafter referred to. That was a case of truckmen, who advertised themselves as general truckmen but whose particular specialty was the moving of heavy machinery. The court held that persons so engaged were not to be deemed carriers for hire and not common carriers because they had no regular tariff of charges for their work, but did it for a special fixed price by agreement. That case has many features in common with the case at bar, for in that case, as in this, the lower court tried it on the theory of the defendant's liability for negligence in unloading the machine which defendant was carrying from a wharf to the place of destination and not that of liability of insurers of the safety of the property. The trial court had been requested to charge that as carriers for hire, defendants were not liable for loss or injury which could not have been prevented by the use of ordinary diligence, and that they were not liable for injury or loss occasioned by unavoidable accident. Says the Court of Appeals (l. c. 39), "These propositions were charged as requested, and, hence, it plainly appears that, although the court refused to charge that the defendants were not common carriers, yet he did charge that they were not liable for any loss or injury which could not have been prevented by ordinary diligence. So the measure of liability which the defendants were held to was that of ordinary diligence and care. This was certainly the most favorable view of the case that the defendants had any right to expect; and since the jury has found upon sufficient evidence that they were wanting in the exercise of such care in unloading the machine from the truck at the factory, the merits of the controversy are not open to review in this court." That

fits the facts in this case very nearly in so far as the matter of instructions is concerned. As we have before observed, the instructions which the court gave in the case at bar at the instance of plaintiff, were a great deal more favorable to the defendant than we think the law of the case authorized or warranted. The opinion of the court, when the Jackson case was before the Court of Common Pleas of New York City and County, is reported in 15 Misc. (N. Y.) 93, also 36 N. Y. Supp. 808, the opinion being by Chief Justice DALY, concurred in by Judges BISCHOFF and PRYOR. As these reports are not very accessible to our brethren of the bar outside of the cities, we have thought it serviceable to give a rather full synopsis of it. In this opinion Judge DALY says:

"The defendants, composing the firm of Hurlburt Bros., are general truckmen, doing business in the city of New York; 'truckmen and forwarding agents,' according to their own description of their occupation. Their 'specialty,' as also described by themselves, is 'heavy machinery' which they move and transport, undertaking what ordinary truckmen cannot do because they have the appliances, wagons and trucks to do it; employing nineteen trucks and twenty horses; making no discrimination as to customers and not refusing to move anything upon request if reasonably paid.

"From this description of the defendant's business they undoubtedly come within the class designated as common carriers, as distinguished from special carriers for hire, who are not engaged in the general business of transporting goods. A common carrier is one who, by virtue of his calling, undertakes, on recompense, to transport personal property from one place to another for all such as may choose to employ him. [Schouler Bailments & Carriers (2 Ed.), 351.] The criterion is whether he carries for particular persons only or whether he carries for every one. If a man holds himself out to do it for every one who asks him he is a

common carrier; 'but if he does not do it for every one, but carries for you or me only, that is a matter of special contract.' [Ingate v. Christie, 3 C. & K. 61.] To be a common carrier one must exercise the business as a public employment; he must undertake to carry goods for persons generally and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation. [Story Bail., sec. 495.] The transportation must be in pursuance of some carriage vocation which the carrier exercises. One may be a common carrier who has no fixed termini, but leaves the course of transportation in each case to depend upon his customer's wishes. [Liver Alkali Co. v. Johnson, L. R. (7 Ex.) 267; 9 Id. 338.] Wagoners and teamsters whose business it is to carry for hire goods and chattels from one locality to another, common porters, drivers, draymen, truckmen and carmen, whether their employment be carried on from town to town or from one part of a town to another, are common carriers. [Story Bail., sec. 496; Richards v. Westcott, 2 Bosw. 589.] It is not necessary that the exclusive business of the party should be carrying; so held where one whose principal pursuit is farming solicits goods to carry to the market town in his wagon on certain convenient occasions. He makes himself a common carrier for those who employ him. [Schouler, 355, 356; see, also, Angell, Carriers, 870, 871; Chevallier v. Straham, 2 Tex. 115; Harrison v. Roy, 39 Miss. 396.]

"The sole business of the defendants in this case was the carrying of heavy articles of merchandise such as was intrusted to them by the plaintiffs. They undertook, for hire, to transport the goods of such as chose to employ them from place to place (Dwight v. Brewster, 1 Pick. 50), undertaking for hire to carry the goods of all persons indifferently (Gisbourn v. Hurst, 1 Salk. 249), and, under the definitions, must undoubtedly be regarded as common carriers. [Allen v. Sackrider, 37 N. Y. 341.]

"By the common law every common carrier is bound to receive whatever may be offered him for transportation on hire so far as comports with his means and the nature of his calling, and is liable to damages for unreasonable refusal. [Schouler, 383; Allen v. Sackrider, *supra*.] It has been said that the test in a doubtful case is whether the carrier would be so liable; but if we apply that test to the present case we meet with no difficulty. These defendants are but truckmen, or cartmen, on a large scale. A truckman would undoubtedly be liable for unreasonable refusal to transport the goods of a householder who was compelled to move, for instance, on the first of May; and in the case of the removal of heavy machinery it is difficult to perceive why truckmen, whose business is to handle just such bulky goods, would not be liable for a like unreasonable refusal in a like emergency. The obligation to carry all goods offered grows out of the general transportation business in which the carrier is engaged, and his holding himself out to the public as a general carrier, so that dealings are had with him in reliance thereon. It makes no difference that these defendants' 'specialty' was the moving of heavy machinery and that they would refuse to move furniture, for, as I said before, the carrier is only bound to convey so far as comports with his means and the nature of his calling.

"Nor is it of importance that defendants have no regular tariff of charges for their work, but that a special price is fixed by agreement in every case they undertake. The necessity for a different charge in each case grows out of the difference in labor in handling articles of great bulk. The charge in each case may be proportioned to the risk assumed and commensurate with the carriers' obligation as insurers."

In *Caye v. Pool's Assignee*, 108 Ky. 124, 55 S. W. 887, also cited by Hutchinson, the appellant was held to be a common carrier. "He was engaged," says the court (l. c. 126), "in the business of transporting chat-

tels for all persons who chose to employ and remunerate him therefor. Owners of stages, stage wagons, railroad cars, teamsters, cartmen, draymen and porters are common carriers," citing Black, Law Dict.; 2 Kent, Comm. 597, and 1 Bouv. Law Dict., p. 299.

Referring again to the case of Pennewell v. Cullen, supra, it is said by the Supreme Court of Delaware (l. c. 241) that it is not necessary that the trips of the defendant averred to be a common carrier should be regular between the same points or places, if engaged in the business of carrying grain for others, generally, to and from any point, he is liable as a common carrier and his liability as such is that of an insurer against everything except unvoidable accident, usually called the act of God.

In the very old case and what may be said the leading case of Forward v. Pittard, an action on the case against the defendant as a common carrier for not safely carrying and delivering goods, it appeared that the defendant was a wagoner, carrying hops from one place to another by his public road wagon. Lord MANSFIELD, delivering the opinion, as reported 1 D. & E. 27, l. c. 33, assumes that the business was that of a common carrier and that the wagoner was liable as such, not simply for due care and diligence but as an insurer and liable for a fire which had injured the goods, the fire being the result of an accident but not resulting from an act of God, as would be lightning or from the act of the King's enemies. This is the case in which Lord Mansfield defines the meaning of an act of God as distinguished from the act of man.

In Ingate v. Christie, 3 C. & K. 61, Baron Alderson, referring to Mr. Justice Story as his authority and as great authority, treating of a case in which the defendant was employed by merchants to take 100 cases of figs in his lighter from Mills' Wharf, in Thames street, to the "Magnet" steamer, and while they were on the lighter run down by a steamer and the figs lost,

it being proved that the defendant had a counting-house with his name and the word "lighterman," on the door posts of it, and that he carried goods in his lighters from the wharves to the ships for anybody who employed him, says (l. c. 63), "If a person holds himself out to carry goods for everyone as a business, and he thus carries from the wharves to the ships in harbour, he is a common carrier, and if the defendant is a common carrier he is liable here. There must be a verdict for the plaintiff." In a footnote to the report of this case, at page 62, the quotation from Mr. Justice Story, which we have before set out, is set out, together with a long line of authorities cited by Judge Story in support of his position.

In *Nugent v. Smith*, 1 C. P. Div. (Law Reports 1875-76) 19, an opinion by Mr. Justice Brett, it is said (l. c. 27), that "The real test of whether a man is a common carrier . . . really is, whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying on a public employment, or whether he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried." At page 31 of the same report, it is noted that many attempts have been made to except "wharfingers, forwarding agents, carters," and the like from the rule applicable to common carriers, but that all such attempts have failed.

The fact that this defendant may have limited its employment to the mere carriage and moving of household goods, does not change its position as a common carrier, for the employment may be limited to the mere carriage of particular kinds of property and goods and when this is so and the fact is known and avowed, the owners will not be liable as common carriers for any other goods or property entrusted to their agents, with-

out their consent, but they are liable as common carriers for the loss of those goods, in the carriage and moving of which they are engaged as a business, not as a mere occasional act but as a regular business. [The Citizens' Bank v. The Nantucket Steamboat Co., 2 Story's Rep. 16, l. c. 33; Harrison v. Roy, 39 Miss. 396; Gisbourn v. Hurst, 1 Salk. 249; Kansas Pacific Ry. Co. v. Nichols, Kennedy Co., 9 Kan. 235, l. c. 253; Tunnel v. Pettijohn, 2 Harr. (Del.) 48.] It appears in this case and by other reported cases of our own court, that this defendant, like other similar concerns, is also a warehouseman. When acting as such, its liability is that of a warehouseman, not that of a common carrier. The same situation has frequently arisen as to our railroads—they may also be warehousemen, as well as common carriers.

The instruction given to the jury at the instance of the plaintiff was, under the facts proven in this case as to the nature of the business of defendant, erroneous. It submitted to the jury the question as to whether or not the defendant had been negligent, and that it was for the defendant to have shown lack of negligence. This apparently on the theory that the fire, accruing to the damage and destruction of the goods of plaintiff, in itself, threw upon defendant the *onus* of proving want of negligence on its part. It was not an erroneous declaration of the law as to a carrier for hire. Even if defendant was responsible as a mere carrier for hire, it thereby was a bailee for hire and proof of the fact of the delivery of the goods to the defendant in good condition and failure of defendant to return them to plaintiff in like condition, threw upon defendant the burden of excusing itself for non-delivery. [Horton v. Terminal Hotel & Arcade Co., 114 Mo. App. 357, l. c. 362, 89 S. W. 363.] The verdict of the jury may be construed and sustained as responsive to this issue, and as finding from the evidence in the case, that the loss and damage was to be charged to the negligence of the defendant.

True the evidence in the case is slight to this effect, about all of it being that defendant's drivers of the van testified that a street car motorman passing him, called his attention to the fact of a fire in his van, but that he paid no attention to it until afterwards, how long afterwards does not appear, when looking around he himself discovered the fire and that by that time it had obtained such headway that he could not arrest it. The jury had a right to infer negligence resulting in the loss from this. We, as a reviewing court, cannot say that this was not in itself evidence of negligence in the agents and employees of defendant, that if they had given prompt attention to the matter when their attention was called to it the fire could have been extinguished before doing much damage. Be that as it may, the instruction was greatly to the disadvantage of plaintiff himself, and one of which the defendant surely has no right to complain. Being a common carrier, as we hold, on the uncontradicted evidence in the case, the defendant was liable whether negligent or not for the loss or damage to the goods entrusted to it by the plaintiff. As a common carrier it was an insurer against all loss and damage save those due to the acts of God or to those of the public enemy; fire destroying goods, when that fire is the result of any cause other than lightning from the heavens, is an accident against which the common carrier, by his obligation as such, insured. Under the facts peculiar to this case, giving that instruction is not reversible error.

Applying the law as we understand it to the facts in this case, we hold that the instruction asked by the defendant for a direction for a verdict in its favor, as well as the instruction declaring that the defendant was not a common carrier but a carrier for hire, were properly refused. As the evidence in the case was without contradiction that the defendant held itself out as engaged in the general business of moving for all who chose to employ it, in the city of St. Louis, it was, as

to that part of its business, a common carrier and as such liable for this fire which destroyed and damaged the goods of the plaintiff, and while, as we have before remarked, the jury was misdirected as to the necessity of proving negligence on the part of the defendant or failure to prove negligence, that was an error of which this defendant cannot complain. The verdict is obviously for the right party and there is no error in the case to the manifest prejudice of the defendant. The judgment of the circuit court is affirmed. All concur.

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By John M. Cleary.

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17. ———: **Partnership.** While connecting carriers making an agreement for through shipment are not strictly partners, yet they are each liable for losses on any part of the whole line. *Crockett v. Railroad*, 347.
18. ———: ———: **Joint Liability: Partnership.** Where carriers form a partnership for the transportation of freight a contract of one will be held to be the contract of all. *Crockett v. Railroad*, 347.
19. ———: ———: **Partnership: Agency.** Even though connecting carriers are not partners one may be empowered as agent to make contracts for all. *Crockett v. Railroad*, 347.
20. ———: ———: ———: ———: **Liability of Connecting Carrier.** In the absence of statute, or partnership or other such agreement, an initial carrier will not be liable for the negligence of a connecting carrier. *Crockett v. Railroad*, 347.
21. ———: ———: ———: ———: ———: ———. Where a connecting carrier agrees to carry from a junction to destination, it is liable only for losses occurring after its acceptance of shipment. *Crockett v. Railroad*, 347.
22. **Stoppage in Transit: Sufficiency of Evidence.** In an action against a carrier for damages for delivering goods to the consignee after they had been ordered stopped in transit by the shipper, the evidence was held sufficient to sustain a finding that the consignee was insolvent when the order to stop the shipment was given. *Seigfried v. Railroad*, 543.
23. ———: **Proof of Insolvency.** Strict proof of insolvency is not required to authorize stoppage in transit. *Seigfried v. Railroad*, 543.
24. ———: **Knowledge of Consignee's Insolvency.** The right of stoppage in transit does not exist even though the buyer is insolvent if that fact was known to the seller at the time the sale was made. *Seigfried v. Railroad*, 543.
25. ———: **Evidence: Similar Transactions.** Evidence that on other occasions the consignee had paid for his goods promptly was not competent for the purpose of showing that the shipper had knowledge of the consignee's insolvency at the time of the sale. *Seigfried v. Railroad*, 543.
26. ———: **Carrier's Estoppel to Deny Right.** Where the carrier agreed before shipment to stop the goods on demand on certain conditions, it is estopped to deny the shipper's right of stoppage on the ground that there was insufficient proof of insolvency. *Seigfried v. Railroad*, 543.
27. ———: **Liability for Misdelivery: Defenses.** A carrier may defend an action for damages for delivery of goods after notice

CARRIERS OF GOODS—Continued.

to stop them in transit by showing that the notice was received too late. *Ib.*

28. **Delay in Transporting Goods: Evidence Insufficient to Establish Contract.** Plaintiff delivered goods to defendant to be delivered by a connecting carrier. The consignee refused to accept the goods. Plaintiff wrote defendant to return the goods. Defendant would not agree to do so but made an effort to procure their return. Plaintiff sued defendant for delay in returning the goods. There was no proof of any actual promise to return the same, or that plaintiff paid defendant the usual tariff charges. The evidence did not require the court to find for the plaintiff. *Corinth Woolen Mills v. Wabash Railroad Co.*, 456.
29. **Negligence: Destruction of Goods by Flood: Act of God: Proximate Cause: Sufficiency of Evidence.** The failure of a railroad company to anticipate that the flood of 1903 at Kansas City would destroy property would not constitute a cause of action. The loss must be attributed to the act of God, and not to the failure to remove the goods to a place of safety. *Wertheimer, etc., Co., v. Railroad*, 489.
30. **Failure to Furnish Cars: Extraordinary Traffic.** Where unusual traffic should be anticipated, a railroad must prepare for it. *Shoptaugh v. Railroad*, 8.
31. **Private Carriers: Distinction: Liability.** A private carrier with or without a reward is only a bailee, and his liability is determined by the rules governing the responsibility of bailees. A common carrier is one who undertakes for hire to transport the goods of such as choose to employ him, and ordinarily carters and expressmen engaged in carrying freight to and from a depot or warehouse or between places in the same locality or between different localities are common carriers. *Collier v. Langan, etc., Co.*, 700.
32. **Who Are: Liability of: Destruction of Goods by Fire.** A carter who undertakes to move household goods for all who choose to hire him is a common carrier and is liable for all losses thereof, except those caused by act of God or the public enemy. *Ib.*
33. ———: **Questions of Law or Fact.** It is for the court to define what constitutes a common carrier. It is for the jury to say whether the facts proved that a person comes within that definition. *Ib.*
34. **Common Carriers as to Certain Commodities.** A carter who undertakes to carry household goods only, for such as choose to employ him, is a common carrier as to such goods only. If his agent undertakes to carry other goods without the carter's knowledge, the carter will not be liable as a common carrier for loss or injury in the carriage of such goods. *Ib.*
35. **Negligence: Destruction of Goods by Fire: Evidence: Sufficient to Prove Negligence.** When the driver of a moving van is told that the van is on fire and he disregards such warning until too late, a jury is warranted in finding him guilty of negligence. *Ib.*

CARRIERS OF GOODS—Continued.

36. **Warehousemen: Liability.** A common carrier may be a warehouseman and when acting as such its liability is that of a warehouseman and not that of a common carrier. *Collier v. Langan, etc., Co.*, 700.
37. ———: **Liability of: Destruction of Goods by Fire: Negligence: Burden of Proof.** Where goods in the hands of a warehouseman are damaged by fire, the owner in a suit for loss or injury must prove such loss or injury was caused by defendant's negligence. The fact that the goods were delivered to the warehouseman in a good condition and returned in a damaged condition makes a *prima facie* case of negligence. *Ib.*

CARRIERS OF LIVE STOCK.

1. **Delivery.** What is delivery to consignee. *Edwards v. Lee*, 38.
2. **Pleading.** Pleading delay, proving injuries. *Hunter v. Railroad*, 28.
3. **Instructions.** Verbal inaccuracy in instruction immaterial error, when. *Edwards v. Lee*, 38.
4. **Damages.** Measure of damages on substitution of cattle. *Ib.*
5. **Substitution of Cattle.** Burden of proof. *Ib.*
6. ———: **Sufficiency of Evidence.** Sufficiency of evidence in action against carrier for delivering cattle other than those shipped. *Ib.*

CARRIERS OF PASSENGERS.

1. **Assault.** Punitive damages for assault on passenger. *Kelleher v. Railroad*, 553.
2. **Physical Facts.** Instruction as to effect of physical facts. *McClanahan v. Railroad*, 386.
3. **Jerks.** Injury from jerk on freight train. *Ray v. Railroad*, 332.
4. ———: **Injury to Passenger: Freight Train: Proximate Cause of Injury.** Where a passenger gets on a moving freight train and he is then thrown off by a jerk thereof, the prior negligent acts of the defendant are not actionable. *Ib.*
5. ———: ———: **Freight Trains: Risks Assumed.** A passenger on a freight train assumes the risks of injury from jerks and jars incident to the careful operation of such a train, but not those incident to defects in the track, cars or operation. *Ib.*
6. ———: ———: ———: **Res Ipsa Loquitur.** Ordinarily the jerk of a freight train is not *prima facie* evidence of negligence. *Ib.*
7. ———: ———: ———: **Evidence Insufficient to Show Negligence.** Under the evidence in this case, there was not a sufficient showing that the jerk described in plaintiff's evidence was caused by negligence on the part of the defendant. *Ib.*

CARRIERS OF PASSENGERS—Continued.

8. **Defect in Station Platform.** A railroad company is liable for injuries received by a passenger from a defect in its station platform. *McClanahan v. Railroad*, 386.
9. ———: ———: **Proximate Cause: Burden of Proof.** The burden is on the plaintiff to prove that her injuries were the result of defendant's negligence. *Ib.*
10. ———: ———: ———: **Cause of Injury: Sufficiency of Evidence.** The evidence in this case was insufficient to show that plaintiff's injuries were the direct result of defendant's negligence. *Ib.*

COMMON CARRIERS. See *Carriers of Goods, Carriers of Live Stock, Carriers of Passengers.*

CONCURRING NEGLIGENCE.

Unblocked Frog and Going Between Moving Cars. *Brannock v. Railroad*, 301.

CONDITION PRECEDENT.

Failure to Perform Authorizes Rescission, When. *Laswell v. Handle Co.*, 497.

CONFLICT OF LAWS.

1. **Gambling Contracts.** Presumption as to existence of common law in foreign state. In the absence of evidence it is presumed that the common law as to the invalidity of gambling contracts prevails in another state. *Atwater v. Brokerage Co.*, 436.
2. ———: ———: **Public Policy.** Comity does not require the courts of this State to enforce rights accruing under contracts legal in another state if such enforcement contravenes our public policy as declared by statute. *Ib.*

CONNECTING CARRIERS.

Respective Liabilities. *Crockett v. Railroad*, 347.

CONSTITUTIONAL LAW.

1. **Jurisdiction of Appellate Courts.** *State v. McAnally*, 130.
2. **Limitation on Power of City to Contract.** *Edwards v. Kirkwood*, 599.

CONSTRUCTION OF CONTRACTS. See Contracts.**CONSTRUCTION OF STATUTES. See Statutes, Construction of. CONTRACTS.**

1. **Fraudulent Conveyances.** *McKnight, etc., Co., v. Hudson*, 31.
2. **Enforcing Negative Covenants.** *Pope-Turnbo v. Bedford*, 692.

CONTRACTS—Continued.

3. **Damages for Breach.** *Laswell v. Handle Co.*, 497.
4. **Accord and Satisfaction.** **Consideration.** *Arnold v. Steel Co.*, 451.
5. **Delivery.** Delivery to agent of carrier is delivery to consignee. *Edwards v. Lee*, 38.
6. **Sufficiency of Evidence.** Evidence insufficient to establish agreement by carrier to return shipment. *Corinth, etc., Mills v. Railroad*, 456.
7. **Tender Unnecessary, When.** *Laswell v. Handle Co.*, 497.
8. **New Contract.** Employment of servant. *Arnold v. Steel Spring Co.*, 451.
9. **Municipal Corporations.** Employment of attorney by municipal corporation. *Edwards v. Kirkwood*, 599.
10. **Sales.** Breach of contract of sale. *Cope v. Thurston Co.*, 684.
11. **Parol Evidence.** To explain ambiguities. *Kessler v. Claves*, 88.
12. ———. To vary. *Hahs v. Railroad*, 262.
13. **Pleading.** Denying execution of written instrument. *Ib.*
14. ———. Alleging the making of a contract implies its regular execution. *Moots v. Cope*, 76.
15. ———. Facts provable under general denial. *Hahs v. Railroad*, 262.
16. ———. Written instrument. Signing a release on a pay roll is the execution of a written instrument within the meaning of the statute governing pleading thereof. *Ib.*
17. **Rights of Third Persons.** When a contract is made for the benefit of a third party it is enforceable by him. *School District ex rel. v. Beggs*, 177, 187.
18. **Carriers of Live Stock: Delivery to Agent.** Delivery of cattle to carrier's agent is delivery to consignee, when. *Edwards v. Lee*, 38.
19. **Master and Servant: Employment: Accord and Satisfaction: Consideration: Doubtful Claim.** Acceptance of employment for a definite term will constitute a valid accord and satisfaction of a contract of employment for an indefinite time. *Arnold v. Steel Spring Co.*, 451.
20. ———: ———: ———: **Exclusion of Evidence.** Where a new contract of employment is made, evidence as to the terms of the original contract is properly excluded. *Ib.*
21. **Construction: Law Entering Into.** The law is to be read into every contract as a part thereof. *Kessler v. Claves*, 88.

CONTRACTS—Continued.

- 21a. ———: Promise to pay. *Ib.*
22. ———. English words must be given their usual meaning in construing unambiguous contracts. *Simmons v. Westlake, etc., Co., 282.*
23. ———. The meaning of technical terms in a contract, such as "fancy lemons, Harbor Brand," is to be determined by the usual interpretation given by the trade to such words. The case holds what may be delivered under such a contract. *Cope v. Thurston Co., 684.*
24. ———: Intemperance. Definition of term used in insurance contract. *Evans v. Modern Woodmen, 155.*
25. ———: Reasonable Time for Performance. Where a contract does not specify the exact time of performance by either party, each party must act reasonably. *Laswell v. Handle Co., 497.*
26. ———: Building Contracts. A provision of a building contract provided that upon the failure of the contractor to perform any of the agreements contained in said contract the architect should certify that there was a breach thereof, and that the owner might complete the work at the expense of the contractor, and the architect's certificate as to the amount of such expense should be conclusive. Ordinarily, under such a contract, it would be necessary for the owner to allege and prove that the architect's certificate was given; but not where the contractor abandons his contract. *Heidbrink v. Schaffner, 632.*
27. Building Contracts: Action for Breach. In a suit on a bond given to secure the performance of such a contract where the contractor abandons his contract, the owner need not prove that the architect's certificate as to the expense of completing the work had been given. *Ib.*
28. Assignment for Benefit of Creditors: Building Contract: Rights and Obligation of Assignee. An assignee for the benefit of creditors is not bound to carry out the assignor's contract although the estate is liable for its breach. *Simmons v. Westlake, etc., Co., 282.*
29. ———. Modification by assignee of assignor's contract. Where the assignor's contract was modified by mutual agreement between the assignee and the other party to the contract, the other party was bound to perform the contract as modified, even though his liability thereunder exceeded the amount fixed by the original contract. *Ib.*
30. Sales: Contracts: Construction: Performance. A contract for the sale of handles to be manufactured by the seller during a fixed period called for a variety of handles including one called "D-Stem." During a part of the period the seller manufactured and delivered several car loads of handles of the varieties called for. A car load composed of thirty-seven thousand handles, of which thirty-two thousand were D-Stems was not taken by the buyer, he claiming that he was not obliged to take handles of the D-Stem variety. Performance of the contract by the seller without manufacturing D-Stem handles would entail on him a continual loss, as a proportion of every load of timber worked up would be wasted. It was held that

CONTRACTS—Continued.

the buyer's renunciation of its obligation to accept D-Stem handles went to the root of the consideration, amounted to an abandonment of the contract, and relieved the seller from his obligation further to perform. *Laswell v. Handle Co.*, 497.

31. ———: ———: ———: ———. A contract for the output of plaintiff's mill f o. b. cars at the mill does not require the plaintiff to load the cars until he has received shipping directions, where it has been the custom to give such directions, and where the contract calls for inspection at the mill. If, after the seller, on receiving directions, fails to load, he has broken his contract. *Ib.*
32. ———: ———: ———: ———. Where a buyer sends shipping directions which do not reach the seller, and thereafter the seller writes for directions and the buyer does not give them, the buyer is in default. *Ib.*
33. ———: Action for Breach: Refusal to Accept Goods: Evidence: Inferences. The failure to give shipping directions as required by its contract was sufficient evidence in this case to support a finding that defendant had refused to accept and pay for the material manufactured. *Ib.*
34. ———: ———: ———: Specious Defense. Where, in an action for breach of contract, defendant first complains that the goods were not loaded as required by contract, such defense is specious. *Ib.*
35. ———: ———: Recovery Notwithstanding Non-performance. Where one agrees to furnish the output of his mill for a fixed period and borrows money to enable him to perform the contract, the failure of the other party to promptly accept a single carload of the material manufactured would not justify the manufacturer in ceasing further performance of his contract. *Ib.*
36. ———: ———: ———. Where one party fails to perform and wilfully disregards his obligation and the other party cannot conduct his part of the contract without unreasonable sacrifice, he may treat the contract as broken. *Ib.*
37. ———: ———: Effect of Obligor's Failure to Pay Money Due. The prevalent rule is that mere failure to pay money when due will not warrant him to whom it is due to no longer keep his engagement and permit a recovery as though he had. *Ib.*
38. ———: ———. The case decides under what circumstances a party may be entitled to the full benefits of a contract broken by the other party. *Ib.*
39. ———: ———: Action for Breach: Refusal to Accept Goods: Evidence: Inferences. The evidence in this case was sufficient to warrant the inference that plaintiffs closed their mill because of defendant's refusal to perform its contract rather than because of plaintiffs' financial inability to continue the operation of said mill. *Ib.*
40. ———: ———: Breach: Recovery of Unearned Profits. A seller of the product of his mill for a specified time cannot re-

CONTRACTS—Continued.

cover unearned profits on the buyer's breach unless the latter's conduct sufficed in contemplation of law to prevent the seller from further performance. *Ib.*

41. ———: ———: **Dependent Stipulations.** Stipulations in commercial contracts are generally treated as dependent where prompt compliance may result in ruin to the other party. *Ib.*
42. ———: ———: **Conditions Precedent: Fraud: Rescission.** Where one party to a contract agrees to pay a certain reward to the other for signing the contract and such promise is made in bad faith with no intention to pay such reward, the other party may rescind the contract for fraud. *Ib.*
43. ———: ———: ———: ———. An agreement to reward another for the signing of a contract does not make the payment of such reward a condition precedent to the performance of the contract unless the contract so provides. *Ib.*
44. **Invalid Contracts: Indefinite Terms.** Where a quarry company agreed to furnish to another all the dirt and stone taken out of the quarry, the price of the stone being fixed, the contract was not invalid for indefiniteness because no price was agreed upon for the dirt when the parties subsequently fixed that price. *Rozier v. Railroad*, 290.
45. ———: **Mutuality.** Where at the time a contract was made both parties know the quantity of material which would be taken out by reasonable diligence, the contract is not void because lacking in mutuality for lack of specific designation of time of performance. *Ib.*
46. ———: ———. A contract lacking mutuality may become binding by performance. *Ib.*
47. ———: ———. Where a railroad company agrees to take all the material a quarryman can deliver, it is bound to take such material, even though it undertakes to also buy other similar material from another quarry. *Ib.*
48. ———: ———: **Breach: Damages Outside of Contract.** A railroad company contracted to take all the rock delivered by a quarry company. For a time it took dirt as well as rock, and then refused to take either. It was erroneous to allow damages for refusing to take the dirt. *Ib.*
49. **Illegal Contracts: Monopolies: Stipulations Held Valid: Breach of Negative Covenants.** Plaintiff agreed to teach defendant a method for treating the hair, the latter agreeing to use the former's remedies exclusively, and further agreeing not to mention having learned said method, except in connection with the use of said remedies. In an action to restrain the breach of said contract, it was held that the stipulation that defendant should not mention having learned plaintiff's method of treatment except in connection with the use of her preparations was enforceable, and that plaintiff could enjoin defendant from advertising herself as plaintiff's pupil after she had ceased to use plaintiff's remedies in treating the hair, under the rule authorizing injunctions to restrain the breach of a negative covenant in a contract. *Pope-Turnbo v. Bedford*, 692.

CONTRACTS—Continued.

50. ———: **Monopolies: Valid and Invalid Provisions: Divisibility: Stipulations in Restraint of Trade.** A contract with reference to teaching and using a secret method of treating the hair was held to have some stipulations invalid as in restraint of trade, and others not subject to such objection. The restriction upon the right to use methods in common use was in violation of the common law and of section 8966, R. S. Mo. 1899. *Pope-Turnbo v. Bedford*, 692.
51. ———: **Good-will a Species of Property.** The good-will of preparations used in treating the hair and system of treatment is a species of property. *Ib.*
52. ———: **Gambling Contracts: Purchase and Sale of Stocks and Bonds: Intent of one Party only to Gamble.** Under the Missouri statute, the intention of either party to gamble in a transaction makes a contract based thereon invalid, regardless of the innocence of the other party. Under the common law it was necessary to show the intent of both parties to gamble. *Atwater v. Brokerage Co.*, 436.
53. ———: ———: **Brokers and Agents: Right to Recover Affected by Gambling Intent of Principal.** A broker cannot recover commissions for making a contract where one of the parties enters into it for gambling purposes whether the broker knows of such purpose or not. *Ib.*
54. ———: ———: **Intent of One Party Only to Gamble: Contract to be Performed in Foreign State.** A contract made in this State for the buying or selling of stocks in another state is not void because of the intent of one of the parties to gamble therein unless such contract is void by the laws of such other state. *Ib.*
55. ———: ———: **Rights of Brokers and Agents.** A statute forbidding gambling applies to the purchase or sale of stocks and not to contracts creating the relationship of principal and agent. If contracts of purchase and sale are legal in the state where the purchases are to be made, a broker employed in this State can recover for his commissions earned in making such purchases or sales. *Ib.*
56. ———: ———: **Purchase and Sale of Stocks.** Applying proceeds of gambling contract to payment of valid transactions. The acceptance of money procured from an illegal transaction does not make illegal the transaction in which such money is subsequently used. *Ib.*
57. ———: **Telegraph and Telephone Companies: Common Carriers: Illegal Combinations: Equity.** Two telephone companies agreed that messages originating on the lines of one for points on the system of the other not reached by the former's wires, should be carried by the latter. It was also agreed that no other company should have the same privilege. Thereafter one of the companies entered into an agreement with a third company for an exchange of service, which agreement was in contravention of the contract between the two original companies. The injured company sued to enjoin the breach of its said contract. The bill was properly dismissed because the original contract was void as a violation of the companies' duties to serve all equally. *Home Telephone Co. v. Granby, etc., Co.*, 216.

CONTRACTS—Continued.

58. ———: ———: ———: **Common Law and Statutory Obligations.** Telephone companies are not common carriers, but by common law as well as by statute, they must furnish impartial service to all applicants complying with reasonable requirements. *Ib.*
59. ———: ———: ———: **Duty to Transport Messages.** Except as required by statute, a common carrier's obligation ends with prompt transportation over its own lines. *Ib.*
60. ———: ———: ———: **Involuntary Use of Instrumentalities by Rival Concerns.** Common carriers are not required to turn over the use of their instrumentalities to a rival concern. *Ib.*
61. ———: ———: ———: **Granting Exclusive Privileges.** Connecting common carriers cannot grant exclusive privileges to each other. *Ib.*
62. ———: ———: ———: **Duty to Receive Business from Other Companies.** By statute telephone companies must receive business from each other. *Ib.*
63. ———: ———: ———: **Public Service Corporations: Public Interest.** The people have an interest in the service rendered by public service corporations. *Ib.*
64. ———: ———: ———: **Public Service Companies: Right to Select Carrier.** A customer of a telephone line may direct by what connecting line his message shall be transmitted provided delivery can be made as requested. *Ib.*
65. ———: ———: ———: **Contract Granting Exclusive Privilege, Void.** One telephone company cannot agree that all messages arising on its lines shall be transmitted only over the line of another company. *Ib.*
66. ———: ———: ———: **Contract Granting Exclusive Privilege, Void.** The statute which permits telephone companies to join in using their respective lines does not authorize contracts for exclusive privileges. *Ib.*
67. ———: ———: ———: **Operation by Individual: Rights of Public.** An individual operating a telephone exchange is governed by the same regulations against unjust discrimination as is a corporation, and may be compelled to permit the use of his exchange by others in the same business. *Ib.*
68. ———: ———: ———: **Connecting With Other Companies: Contract Granting Exclusive Privilege, Void.** Where two telephone companies undertake to grant each other exclusive privileges as to connections and service on their respective systems such contract is void. *Ib.*
69. ———: ———: ———: **Unlawful Combinations: Telephone Service a Commodity.** Telephone messages are "conveniences or commodities" within the meaning of the statute forbidding unlawful combinations. *Ib.*
70. ———: ———: ———: **Contract Granting Exclusive Connecting Privileges.** A contract between the telephone compa-

CONTRACTS—Continued.

nies in this case is void because it attempted to grant exclusive privileges to the parties thereto. *Home Telephone Co. v. Granby, etc., Co.*, 216.

71. ———: ———: **Unlawful Combinations.** (By REYNOLDS, P. J., dissenting.) The contract in this case did not create a monopoly. *Ib.*
72. ———: ———: **Duty to Receive Business from Other Companies.** (By REYNOLDS, P. J., dissenting.) A telephone company is bound to receive business from another company in the same way that it is bound to receive business from an ordinary customer. *Ib.*
73. ———: ———: **Granting Certain Privileges to Other Companies: Contract not Void.** (By REYNOLDS, P. J., dissenting.) One telephone company may contract with another company by which their properties become part of one system to the exclusion of other companies. It is a violation of such contract for one of the contracting companies to permit another company to make its exchange a part of the system of one of such contracting companies. *Ib.*
74. ———: ———: ———: **Constitutional Rights.** (By REYNOLDS, P. J., dissenting.) Where two telephone companies contract for the mutual interchange of their systems such contract does not give another company the right to the same privilege, and to compel one of such contracting companies to give such non-contracting company such privilege would be a violation of such contracting company's constitutional rights. *Ib.*
75. ———: ———: ———: **Public Service Corporations: Right to Contract.** (By REYNOLDS, P. J., dissenting.) Telephone companies are not strictly common carriers and they are entitled to their rights of property and contract. *Ib.*
76. ———: ———: ———: **Statute Directed Against What Agreements.** (By REYNOLDS, P. J., dissenting.) It is against such agreements as prevent others from using the facilities of the contracting parties to as full an extent as other customers might use them that the anti-trust statute is aimed, which the contract in question does not do. *Ib.*

CONTRIBUTORY NEGLIGENCE.

1. **Knowledge of Danger: Proximate Cause.** Where one knows or should know of the negligence of another, his failure to exercise proper care to avoid the result of such negligence is itself negligence, proximately contributing to cause his injury. *Brannock v. Railroad*, 301.
2. **Master and Servant: Railroads: Injury to Servant: Going Between Cars: Sufficiency of Evidence.** What evidence under the facts in this case would establish contributory negligence on the part of the deceased in going between the cars to make a coupling and what evidence would not make such defense. *Ib.*
3. ———: ———: ———: ———. The question of the contributory negligence of the deceased in this case was for the jury. *Ib.*

CONTRIBUTORY NEGLIGENCE—Continued.

4. ———: Assumption of Risk. A servant does not assume the risk of injury from a violation of a statute requiring the blocking of guardrails, even though he knows of such violation. *Ib.*
5. ———: ———: ———: ———: Speed of Cars: Safety Device Furnished. Where a safety device permits coupling to be made without going between cars, a servant is ordinarily negligent who goes between the cars to make such coupling. But when the device is defective the servant's acts in going between the cars are to be determined as though there had been no such device. *Ib.*
6. ———: ———: ———: ———. Whether or not a servant was negligent in going between cars moving at 4 to 6 miles an hour, to make a coupling, is a question for the jury under ordinary circumstances. *Ib.*
7. ———: ———: ———: ———: ———: ———: Unblocked Rails: Proximate Cause. The contributory negligence of deceased in going between cars, and the negligent maintenance of unblocked frogs, would constitute concurring negligence on the part of deceased and defendant. *Ib.*
8. Medical Treatment. Duty as to procuring medical attention. *Scholl v. Grayson*, 652.

CONVERSION.

1. Goods Sold, Cash on Delivery. Where consignee ignores restriction and resells, purchaser is liable if he has knowledge or notice thereof. *Smith v. Bank*, 461.
2. ———. What facts will warrant finding that purchaser had notice. *Ib.*

CORPORATIONS.

1. Private Bank Owned by Individual. Not treated as a corporation. *Gupton v. Carr*, 105.
2. Identity of Control: Liability. The mere fact that the same persons are stockholders or managers of two corporations is not in itself sufficient to render one corporation chargeable with the acts of the other. *Vogelsong v. St. Louis, etc., Co.*, 578.
3. Foreign Corporations: Travelling Salesmen: License. A foreign corporation selling through a travelling salesman is not doing business within the state so as to require the taking out of a license. *Greenbrier Distillery Co. v. Van Frank*, 204.

COSTS.

Counterclaim. In an action where plaintiff prevails on his petition and defendant on his counterclaim the question of costs is within the discretion of the court. *Beyer-Knox Co. v. Ewell*, 188.

COUNTERCLAIM.

Costs. *Beyer-Knox Co. v. Ewell*, 188.

COURTS.

1. **Probate Courts. Jurisdiction of, over property of dead banker.** *Gupton v. Carr*, 105.
2. **Construing Legislature's Motives.** *Hamberg v. Hamberg*, 591.
3. **Jurisdiction of Appellate Courts: Construction of Constitution Not Involved.** A constitutional question is not presented when the case may be determined without having to construe the constitution. *State v. McAnally*, 130.
4. ———: **Suit to Quiet Title: Appeal from Order Setting Aside Judgment.** An appeal from an order setting aside a final judgment in a suit to quiet title should be allowed to the Supreme Court. *Jeude v. Sims*, 65.

CRIMES AND PUNISHMENT.

1. **False Affidavit: Indictments and Informations: Requisites.** An indictment or information must set out the charge with sufficient certainty to advise accused of the offense charged so as to enable him to prepare his defense. *State v. Thothos*, 596.
2. ———: ———: **Definiteness.** An information charging the making of a false affidavit must state the officer before whom it was made, and an allegation that it was made before an officer authorized to administer oaths is too indefinite. *Ib.*
3. **Variance Between Information and Proof.** Proof that a false affidavit was made before a notary public will not warrant a conviction on a charge that such affidavit was made before the excise commissioner. *Ib.*
4. **Criminal Practice: Right of Trial by Jury.** A waiver of a jury in a criminal case takes affirmative action on the part of the defendant and cannot be implied from his silence. *State v. McAnally*, 130.
5. ———: ———: **Constitutional Law. Deprivation of constitutional right to jury.** *Ib.*
6. **Assault With Intent to Kill: Indictments and Informations: Malice not Alleged.** An indictment for assault with intent to kill need not contain the words "on purpose and with malice aforethought." *State v. Ostman*, 422.
7. ———: **Instructions. "Ready" to assist in assault.** An instruction authorizing a conviction if accessories aided or abetted in the commission of an assault, or stood "ready" to aid and assist therein was not erroneous. The meaning of the word ready is defined. *Ib.*
8. ———: **Felony: Definition.** Where a crime comes within the definition of a felony it is not made a misdemeanor because the jury is authorized to assess lighter punishment than is assessed for felonies. *Ib.*
9. ———: **Conviction of Common Assault.** A person indicted for a felonious assault may be convicted of a common assault. *Ib.*

CRIMES AND PUNISHMENT—Continued.

10. **Common Assault: Sufficiency of Evidence.** The evidence in this case was sufficient to sustain a verdict for common assault. *Ib.*
11. ———: ———: **Indictments and Informations: Election Between Counts.** Three persons were charged with assault with intent to kill in two counts; one under section 1847 and one under section 1848. One of the parties was charged as principal in the first count and the other two as accessories; one of the other parties was charged as principal in the second count and the other two as accessories. Each was charged with a felony and none with a misdemeanor, and the state was not required to elect on which count it would proceed. In such a case the instructions may permit the jury to determine whether the defendants were all guilty under the first count, or under the second count, without requiring them to find which was principal and which was accessory. *Ib.*
12. ———: **Principal and Accessory.** Where one commits a crime and the others aid and abet, all are principals, and the conviction of the one doing the act is not a condition precedent to the conviction of the others. *Ib.*
13. ———: ———: **Indictments and Informations.** Where one commits a crime and others aid and abet it, the indictment may charge them all in one count, or may allege the matter according to the facts. *Ib.*

DAMAGES.

1. **Measure of, on Breach of Contract to Take Output of Mill.** *Laswell v. Handle Co.*, 497.
2. **Sufficiency of Evidence to Show Impairment of Earning Capacity.** *Panos v. American, etc., Co.*, 570.
3. **Double Damage Statute for Injury to Stock.** *Pruitt v. Railroad*, 2.
4. **Pleading. Submitting issues not pleaded.** *Scholl v. Grayson*, 652.
5. ———. **Sufficiency of pleading of loss of earnings.** *Ib.*
6. ———: **Motion to Make Allegation of Damages Definite.** *Shoptaugh v. Railroad*, 8.
7. ———. **Proof of expenses incurred competent under allegation of expenses paid, when.** *Scholl v. Grayson*, 652.
8. **Carriers of Live Stock: Substitution of Other Stock: Measure of Damages: Instructions.** Proper measure of damages in action against carrier for delivering stock other than that shipped. *Edwards v. Lee*, 38.
9. ———: ———: ———: **Burden of Proof.** The burden is on plaintiff to prove the necessary elements constituting his damage. *Ib.*
10. **Carriers of Passengers: Assault on Passenger: Punitive Damages.** The evidence in this case was sufficient to submit to the jury the issue of punitive damages. *Kelleher v. Railroad*, 553.

DAMAGES—Continued.

11. **Mental Pain: Malice: Pleading.** Allegations of a petition charging mental suffering producing loss of sleep and nervous shock as the result of defendant's malicious disturbance of plaintiff's peace are sufficient as against the objection that pain of body is not the subject of damages without proof of physical injury. *Voss v. Bolzenius*, 375.
12. **Negligence: Personal Injuries: Damages: Duty of Person to Lessen Damages: Selection of Physician.** An injured person must use reasonable care to select a physician of good repute and if he does so, he is not answerable for the mistakes of the physician, nor will the misjudgment of the physician serve to mitigate plaintiff's damages. *Scholl v. Grayson*, 652.
13. **Common Carriers: Failure to Furnish Cars: Duty to Lessen Damages.** Where a plaintiff, desiring to ship logs, knows of shortage of cars, he cannot increase his damage by accumulating logs to be shipped. *Shoptaugh v. Railroad*, 8.
14. **Personal Injuries: Function of Jury.** The assessment of damages in a personal injury suit is for the jury, subject to the supervising control of the court. *Panos v. American, etc., Co.*, 570.
15. **Sales: Contracts: Breach: Measure of Damages.** On breach of a contract for the purchase of the output of a factory, the measure of damages is the difference between the contract price of the goods and the cost of their production. *Laswell v. Handle Co.*, 497.

DEPARTURE.

Refusal of Leave to Amend. Where amended reply is a departure from petition, court properly refuses leave to amend, particularly when evidence insufficient to support allegations contained in reply. *Moots v. Cope*, 76.

DEPOT PLATFORM.

Carriers of Passengers. Passenger injured by defect in. *McClanahan v. Railroad*, 386.

DIVORCE.

1. **Public Policy: Function of Courts.** The courts do not consider the motives actuating the passage of laws for divorce. It is their function to administer the law. *Hamberg v. Hamberg*, 591.
2. **Desertion: Sufficiency of Evidence.** Where the evidence shows absence of one spouse from the other without reasonable cause for more than one year, desertion is established. *Ib.*
3. **———: Decree as a Matter of Right.** Where a plaintiff offers evidence sufficient to warrant a divorce he is entitled thereto, provided he is not also at fault. *Ib.*

DISTURBANCE OF PEACE.

Punitive Damages for. *Voss v. Bolzenius*, 375.

DRAYMEN.

Liability as Carriers. *Collier v. Langdon, etc., Co.*, 700.

ELECTION. See Practice, Trial, 21.

EQUITY.

1. **Estoppel. Pleading.** *Moots v. Cope*, 76.
2. ———: **Municipal Corporations.** Estoppel by municipal corporation to question validity of contract irregularly executed. *Edwards v. Kirkwood*, 599.
3. ———: **Party Assenting.** Estoppel of one assenting to course of dealing to complain thereof. *Gupton v. Carr*, 105.
4. **Pleading.** Uniting legal and equitable defenses and methods of determining same. *Laswell v. Handle Co.*, 497.
5. **Bill of Discovery: Abolition by Code.** The modern right to take depositions dispenses with the ancient bill of discovery. *Vogelsong v. St. Louis, etc., Co.*, 578.
6. **Accounting.** An action for accounting will not lie as a ground for relief in equity unless founded upon some known and established equitable ground of action. *Ib.*
7. **Prayer for General Relief.** Where in an equity case, plaintiff prays for a discovery and an accounting, which are obsolete, and also prayed for general relief, the court may award such relief as the facts stated in the petition may authorize. *Ib.*
8. **Illegal Contracts.** Equity will not enforce a void contract. *Home Telephone Co. v. Granby, etc., Co.*, 216.
9. **Contracts: Negative Covenant: Action Will Lie to Restrain Breach: Equity.** An action in equity will lie to restrain the breach of a negative stipulation in a contract which is supported by a consideration, if it is not oppressive, opposed to the policy of the law, nor for personal services. *Pope-Turnbo v. Bedford*, 692.
10. ———: ———: ———: **No Irreparable Injury.** There is authority for saying the violation of a negative covenant will be restrained, even though it does not appear irreparable damage will flow from a violation of it, and that an injunction will be granted almost as a matter of course to prevent the breach of such covenants. *Ib.*

ESTOPPEL.

1. See Equity.
2. **Carriers.** Carriers estopped to question consignee's insolvency on order to stop shipment in transit. *Seigfried v. Railroad*, 543.
3. **Municipal Corporations.** Estopped to question validity of irregularly executed contract, when. *Edwards v. Kirkwood*, 599.

EVIDENCE.

1. **Incompetency.** Erroneous proof of physician's bill harmless error, when. *Scholl v. Grayson*, 652.
2. ———. Proof of expenses incurred competent under allegation of expenses paid, when. *Ib.*
3. **What is Not Prima Facie Proof.** Proof of ownership in action on taxbill. *State v. Bartlett*, 133.
4. **Accord and Satisfaction.** Terms of original contract incompetent after execution of accord and satisfaction. *Arnold v. Steel, etc., Co.*, 451.
5. ———: **Account Stated: Payment.** In an action on an account stated, defendant cannot offer as a defense agreements existing prior to the making of the account stated. Proof of payment in such an action must be of payments made after this alleged settlement. *Barr v. Lake*, 252.
6. **Negligence: Automobiles: Personal Injuries: Humanitarian Doctrines: Evidence: Distance in Which Automobile Can be Stopped.** In a suit for damages for being struck by an automobile, defendant showed that the plaintiff negligently ran in front of the car so close to it that the car could not be stopped in time to avoid the accident. It was competent for plaintiff to show the automobile could have been stopped after the dangerous position of plaintiff should have been discovered. This evidence was competent not as a basis of recovery but to overcome the defense of contributory negligence. *Scholl v. Grayson*, 652.
7. **Admissions: Petition in Other Action.** A petition filed by the plaintiff in another suit is not competent as an admission where it establishes no fact favorable to the defendant. *Ib.*
8. **Admissions: Party Bound by His Own Testimony, not Bound by His Adversary's.** The admission by a plaintiff that he desired to enter into certain contracts for gambling purposes is binding on him so as to preclude his right to recover on those contracts; but such admissions are not conclusive on the other party to such contracts. *Atwater v. Brokerage Co.*, 436.
9. **Circumstantial Evidence.** Sufficiency of. *Greenbrier Distillery Co. v. Van Frank*, 204.
10. ———: **Railroads: Negligence: Injury to Child on Track.** Evidence that a child was seen approaching defendant's tracks just prior to the movement of the cars thereon was sufficient to prove that it was in the act of passing over such tracks at the time of its death thereon. *Compton v. Railroad*, 414.
11. ———: **Principal and Agent: Circumstances Establishing Agency.** Where defendant is sued for liquor purchased by an alleged agent, the holding by defendant of liquor licenses is competent on the issue of whether or not he was the real purchaser. *Greenbrier Distillery Co. v. Van Frank*, 204.

EVIDENCE—Continued.

12. **Incompetency. Failure of local camp to punish for intemperance incompetent to disprove intemperance of insured.** *Evans v. Modern Woodmen*, 155.
13. **Wife Acting as Agent a Competent Witness.** *Collier v. Langan, etc., Co.*, 700.
14. **Contracts Not Binding on Third Persons.** Under the facts in this case, evidence of the restriction of the power of a consignee to dispose of the goods consigned to him was incompetent in a controversy with one having no notice of such restriction. *Smith v. Bank*, 461.
15. **Carriers of Goods: Stoppage in Transit: Delivery to Carrier: Bill of Lading: Evidence.** A bill of lading issued by a railroad company, returned to it on its demand when the shipper requested the goods to be stopped in transit, was prima-facie evidence that the company had received the goods for shipment. *Seigfried v. Railroad*, 543.
16. ———: ———: **Similar Transactions.** Showing notice of consignee's insolvency by prior transactions between parties. *Seigfried v. Railroad*, 543.
17. **Sales: Breach of Contract: Market Value: Evidence.** Where a contract provided for the delivery of lemons at Topeka, Kansas, at which place there was a market value thereof, evidence of their market value at St. Louis was incompetent in an action for the breach of the contract. *Cope v. Thurston Co.*, 684.
18. **Personal Injury: Fractured Bone: Hypothetical Question.** Where a petition charges that a bone was fractured and plaintiff's evidence shows she walked immediately after the accident, and defendant offers proof that such an injury would prevent plaintiff walking, it is proper to permit plaintiff to cross-examine defendant's witnesses to show that plaintiff could walk after there had been a partial fracture of the bone. *McClanahan v. Railroad*, 386.
19. **Parol Evidence.** Varying written authority of agent to sell real estate by parol. *Moots v. Cope*, 76.
20. ———: **Bills and Notes.** Parol evidence is inadmissible to show that a note was intended as a mere receipt. *Kessler v. Claves*, 88.
21. ———: ———. Consideration may be contradicted. The consideration, or lack of it, may always be proved in an action between the parties to a promissory note. *Ib.*
22. ———: ———: **Explaining Ambiguity.** Parol evidence of surrounding circumstances, situation of the parties, etc., is competent to explain ambiguous language in a contract. *Ib.*
23. ———: ———. Parol evidence is inadmissible to impeach a contract except in case of fraud, mistake, etc. *Ib.*
24. ———: **Receipts.** A receipt is open to parol examination; a contract is not. *Hahs v. Railroad*, 262.

EVIDENCE—Continued.

25. ———: **Releases.** A release of damages cannot be contradicted by parol even though evidenced merely by a signature to a pay roll on which plaintiff acknowledges a "full release of all damages sustained March 31, 1906." *Hahs v. Railroad*, 262.
26. ———: ———. Parol evidence is competent to show the situation of the parties at the time the contract is made. *Ib.*
27. **Presumptions.** Presumption of legality of contract of employment. *Edwards v. Kirkwood*, 599.
28. ———. Certificate to do business prima facie proof of compliance with law. *Missey v. Knights and Ladies of Honor*, 137.
29. ———: **Personal Injury: Presumption of Ability to Work.** Where there is evidence of plaintiff's earnings prior to his injury, but no evidence as to his prior physical condition, the jury is authorized to presume that he was able to work and earn wages. *Panos v. American, etc., Co.*, 570.
30. ———: **Witnesses: Failure to Produce.** The failure of a plaintiff to produce her doctor and other witnesses who would know the extent of her injuries is a strong circumstance against her. *McClanahan v. Railroad*, 386.
31. ———. Presumptions exist only in absence of evidence. *Brannock v. Railroad*, 301.
32. ———: **Receipt of Mail Matter.** Evidence purporting to show the receipt of a letter and that it was withheld from the addressee was held in this case to be too indefinite to make its exclusion erroneous. *Greenbrier Distillery Co. v. Van Frank*, 204.
33. ———: **Receipt of Telegram.** Evidence purporting to show the receipt of a telegram and a wrongful refusal to deliver the same to the addressee was competent for that purpose, but its exclusion was immaterial error in this case. *Ib.*
34. **Res Gestae: Negligence: Killing Child: Spontaneous Utterance.** The query of a motorman right at the time of an accident as to whether or not he had struck a dog was a part of the *res gestae* and admissible. *Knittel v. United Railways Co.*, 677.
35. **Conclusiveness.** Opinion evidence not binding on party offering it, when. *Brannock v. Railroad*, 301.
36. **Expert Witnesses: Failure to Furnish Cars.** When non-experts may testify as to when unusual traffic should be expected. *Shoptaugh v. Railroad*, 8.
37. ———: ———: **Evidence of Prior Shortages.** Evidence of similar conditions in former years is competent to prove duty to anticipate shortage. *Ib.*
38. ———: **Carriers of Passengers: Injury to Passenger: Freight Train: Unusual Jerks.** A passenger on a freight train who has shipped stock thereon for years, but who is not shown to have

EVIDENCE—Continued.

had any considerable experience as a passenger thereon, is not an expert as to whether or not a jerk was unusual. *Ray v. Railroad*, 332.

39. **Opinion Evidence: Non-expert Witness.** Evidence of a non-expert witness as to the negligent character of a jerk has no probative value. *Ib.*
40. ———: **Negligence: Automobiles: Speed Expert.** The witness in this case was sufficiently expert to testify as to what distance was sufficient for the stopping of an automobile. *Schoil v. Grayson*, 652.

EXECUTORS AND ADMINISTRATORS.

1. **Pleading.** Form of pleadings in probate courts. *Kessler v. Claves*, 88.
2. **Banks and Banking: Death of Banker: Jurisdiction of Probate Court.** A probate court, not the secretary of state, has control over a solvent bank whose owner is dead. *Gupton v. Carr*, 105.
3. ———: **Executor of Owner.** An executor of the deceased owner of a private bank is entitled to take possession of its funds and to receive commissions for handling the same legally. *Ib.*
4. ———: **Rights of Executor of Deceased Banker: Commissions.** An executor of the deceased owner of a private bank who pays the depositors in such bank without an order of the probate court is entitled to his commissions on such payments. *Ib.*
5. ———: **Status of Executor: Estoppel: Distribution by Agreement.** One who consents to the distribution by the executor of the funds of a bank to its depositors cannot complain that demands against the estate were paid without the order of the probate court or object to the payment of the executor's commission for making such payments. *Ib.*

FENCES. See *Railroads*.

FIRES. See *Railroads*.

FOREIGN CORPORATIONS.

Drummer's License. *Greenbrier, etc., Co. v. Van Frank*, 204.

FRATERNAL BENEFIT ASSOCIATIONS.

1. **Regulation by Courts: Method of Carrying on Work.** The work and government of fraternal associations carried on in good faith, are not subject to the scrutiny of the courts. *Missey v. Knights and Ladies of Honor*, 137.
2. ———: **Method of Selecting Officers.** The appointing, rather than the electing, of officers, does not deprive such a society of its being a representative body, and thereby make it subject to the general insurance laws of the State. *Ib.*

FRATERNAL BENEFIT ASSOCIATIONS—Continued.

3. **Status of Defendant.** Under the evidence in this case, defendant was a mutual benefit association and not a general insurance company. *Missey v. Knights and Ladies of Honor*, 137.
4. **Certificate to do Business: Prima Facie Evidence.** A certificate of a fraternal benefit association to do business in this State is prima facie proof that it had the necessary requirements of such an association. *Ib.*
5. **Foreign Company Licensed in This State: Powers of.** A fraternal benefit association licensed to do business in this State as such, cannot do an insurance business on any other plan. *Ib.*
6. **Relationship Between Insured and Beneficiary: Provisions of Policy.** Where the by-laws of a fraternal benefit society provide for insurance for the benefit of certain relatives only, the issuance of a certificate in favor of one as a relative who is in fact not such a relative gives no right to such beneficiary. *Ib.*
7. **Evidence: Failure of Local Camp to Prefer Charge.** Proof that the local camp of which the insured was a member had never charged him with intemperance is incompetent to disprove the charge of intemperance. *Evans v. Modern Woodmen*, 155.
8. **Action on Certificate: Defenses.** Mutual benefit insurance societies are not subject to Missouri laws regulating the defense of old line insurance companies. *Ib.*
9. **Defenses to Suits.** The law as to false representations and warranties applies with full force to fraternal insurance societies. *Evans v. Modern Woodmen*, 155.
10. **Agent of Insured: Misstatement: Proof of Loss: Explanation: Sufficiency of Evidence.** There was sufficient evidence in this case to warrant the submission of the issue as to whether the insured had misrepresented his age. *Ib.*
11. **Forfeiture of Membership: Uncontradicted Evidence Requires Direction of Verdict.** Where there is uncontradicted evidence showing a forfeiture of membership the court should direct a verdict for defendant. *Ib.*
12. **Intemperance of Insured: Intoxication at Time of Death: Question for a Jury.** On conflicting evidence as to the intemperate habits of deceased, the question was for the jury. *Ib.*
13. **Construction of Certificate: Definition of Intemperance.** By the word intemperate is meant habitually intemperate. *Ib.*

FRAUD.

1. **Authorizes Rescission of Contract.** *Laswell v. Handle Co.*, 497.
2. **Must be Pleaded.** *Barr v. Lake*, 252.

FRAUDULENT CONVEYANCES.

1. **Creditor at Large: Suit Against Persons Aiding Debtor: Action Will Not Lie, When.** Persons assisting a debtor to shuffle his property for the purpose of defeating his creditors are not liable to general creditors of such debtor, although there may be a liability in favor of a creditor holding a judgment lien on the property so assigned. *Fernandez v. LaMothe*, 644.
2. ———: ———: ———: **Pleading.** Plaintiff claimed that she had earned a commission from one defendant for the sales of lands for him to the other defendants; that the other defendants had conspired with him to cheat plaintiff out of her commissions and had formed a corporation to take the title to said property. Her petition was held to be bad because it improperly joined different causes of action against different defendants in a law action; and it did not state a cause of action under section 1931 for representing that a fraudulent transaction was made in good faith. *Ib.*
3. **Purchasing Assets of Failing Firm: Voluntary Purchaser.** When the purchaser of property from an insolvent debtor cancels his claim and pays an additional consideration, he is a voluntary purchaser. *McKnight, etc., Co. v. Hudson*, 31.
4. ———: **Purchaser's Knowledge of Fraudulent Intent.** Knowledge by a voluntary purchaser that the sale made to him is for the purpose of defrauding creditors, makes the sale void. *Ib.*
5. ———: **Intent to Defraud not Material.** While a creditor has the right to take enough of debtor's property to pay his debt, yet when he takes more than enough, knowing the tortious purpose, the transaction is invalid as against creditors, even though he pays full value for the property. *Ib.*
6. **Intent to Defraud Creditors: Instructions.** Where one who has a claim against an insolvent concern, buys its goods for more than the amount of his claim, paying cash for the difference, and knowing of the debtor's intent to defraud his creditors, and on such goods being attached by creditors of the insolvent firm, the purchaser files an interplea, his claim that he was innocent of actual participation in the scheme to defraud the debtor's creditors does not justify his acts. *Ib.*

GAMBLING CONTRACTS.

Enforcible When and by Whom. *Atwater v. Brokerage Co.*, 436.

GOOD-WILL.

A Species of Property. *Pope-Turnbo v. Bedford*, 692.

HUMANITARIAN DOCTRINE.

Indirectly Applied in Automobile Case. *Scholl v. Grayson*, 652.

HUSBAND AND WIFE.

1. **Competent as Witnesses, When.** *Collier v. Langan, etc., Co.*, 700.

HUSBAND AND WIFE—Continued.

2. Divorce. See Divorce.

ILLEGAL CONTRACTS. See Contracts.**INDICTMENTS AND INFORMATIONS.**

1. Assault With Intent to Kill. *State v. Ostman*, 422.
2. Must be Definite. *State v. Thothos*, 596.
3. Variance. *Ib.*

INSTRUCTIONS.

1. Improper Statement of Rule of Liability of Connecting Carriers. *Crockett v. Railroad*, 347.
2. Carriers of Passengers: Injury to Passenger: Physical Facts. Where it is practically impossible for plaintiff to have walked after receiving such an injury as she claims to have received, the refusal of a cautionary instruction telling the jury that if her evidence on that issue was contrary to the physical facts, it should be disregarded, was error. *McClanahan v. Railroad*, 386.
3. Carriers of Goods: Destruction of Goods by Fire: Making Defendant Liable as Bailee: Harmless Error. A common carrier of household goods sued for loss of goods by fire while in its custody as carrier may not complain of instructions limiting its liability to the liability of a bailee for hire, where the jury could find that its negligence caused the loss, and where the uncontradicted evidence showed its liability as a common carrier, whether it was negligent or not. *Collier v. Langan, etc., Co.*, 700.
4. Waiver. Party failing to ask instruction on a theory abandons it, when. *Greenbrier Distillery Co. v. Van Frank*, 204.
5. Measure of Damages on Substitution of Cattle by Carrier. *Edwards v. Lee*, 38.
6. Master and Servant: Failure to Submit Issue of Contributory Negligence. Plaintiff's instruction in this case was erroneous in failing to submit the issue of contributory negligence on the part of deceased in going between moving cars. *Brannock v. Railroad*, 301.
7. Principal and Agent: Agent's Authority: Circumstantial Evidence. It is ordinarily proper to instruct the jury that the authority of an agent may be shown by circumstantial evidence. *Greenbrier Distillery Co. v. Van Frank*, 204.
8. Comment on Evidence. Instructions must not comment on the evidence. *Ib.*
9. ———. An instruction commenting on particular facts by singling them out is properly refused. *Smith v. Bank*, 461.
10. Covered by Others Given. It is not error to refuse a requested instruction which is covered by others already given. *Ib.*

INSTRUCTIONS—Continued.

11. **Abstract Statement of Law.** Instructions should not submit abstract propositions of law. *Edwards v. Lee*, 38.
12. **Must be Based on Evidence.** An instruction without evidence on which to base it, is properly refused. *Smith v. Bank*, 461.
13. **Conformity to Evidence.** An instruction should not permit a recovery for permanent injuries in the absence of supporting evidence. *McClarín v. Grenzfelder*, 478.
14. ———: **Damages: Personal Injury: Loss of Time: Inability to Work.** Evidence that plaintiff *did* not earn wages would not authorize a finding that he *could* not earn them, and an instruction submitting such issue was erroneous. *Panos v. American, etc., Co.*, 570.
15. **Issue Not Within Pleadings.** Harmless error in submitting issue not covered by evidence. *Ib.*
16. **Carriers of Live Stock: Delivery Prevented by Act of God or Public Enemy: Erroneous Instruction Harmless.** Where an instruction attempts to make the act of God a sufficient defense but fails to do so because of verbal inaccuracy, but that issue is not raised by the evidence, the error is immaterial. *Edwards v. Lee*, 38.

INSURANCE.

Fraternal Benefit Associations. *Missey v. Knights and Ladies of Honor*, 137.

JUDGMENTS.

1. **Replevin.** Failure to award plaintiff right of possession in replevin action immaterial error. *Beyer-Knox Co. v. Ewell*, 188.
2. **Presumption of Regularity.** *Kessler v. Clayes*, 88; *Bick v. Dickson*, 69; *Bick v. Umstadt*, 74; *Kelleher v. Railroad*, 553.
3. **Saving Exceptions.** By record entry ineffective. *School District ex rel. v. Beggs*, 177, 187.
4. **Scire Facias: New Suit on Judgment.** *Scire facias* will not lie when a suit on the judgment to be revived is pending on appeal. *Bick v. Dickson*, 69; *Bick v. Umstadt*, 74.
5. **Scire Facias: Actions.** *Scire facias* is not a new action. *Ib.*
6. **Form of: Method of Enforcement.** The law directs the force and mode of enforcement of a judgment, and it is not material that the judgment itself should set out these matters. *Jamison v. Harvey*, 145.
7. ———: **Action for Taxes.** Where the law regulates the effect of a judgment, recitals in the judgment attempting to give it a different character are of no effect. *Ib.*
8. ———: ———: **Actions.** An action will not lie on a judgment *in rem*. The remedy is to enforce the original judgment by special execution, while the judgment is alive. *Ib.*

JURISDICTION OF APPELLATE COURTS.

1. **Case Involving Construction of Constitutional Law.** *State v. McAnally*, 130.
2. **Suit to Quiet Title.** *Jeude v. Sims*, 65.

JURY.

1. **When Case Should be Submitted to.** See **Sufficiency of Evidence.**
2. **Function of, in Assessment of Damages.** *Panos v. American, etc., Co.*, 570.
3. **Right to Trial by Not Waived When.** *State v. McAnally*, 130.
4. **Saving Exception to Challenge of Juror.** *Pemiscot, etc., Co. v. Davis*, 194; *Smith v. Bank*, 461.
5. **Relationship of Parties to Jurors.** A juror who is a second cousin to the wife of one of the parties is ineligible. *Pemiscot, etc., Co. v. Davis*, 194.

JUSTICES OF THE PEACE.

1. **Pleading.** The defendant's appearance in a justice court operates as a general denial. *Barr v. Lake*, 252.
2. ———: **Set-off and Counterclaim.** A set-off or counterclaim not pleaded before a justice of the peace cannot be shown in the circuit court on appeal. *Ib.*
3. **Notice of Appeal: Sufficiency.** The notice of appeal from the judgment of the justice in this case was insufficient. *Potts v. Nahm*, 562.
4. ———; ———: **Amendment.** An insufficient notice of an appeal from the judgment of the justice of the peace cannot be amended particularly after judgment of affirmance in the circuit court. *Ib.*

LANDLORD AND TENANT.

1. **Railroad Lease.** Lease of railway by one company to another gives employee of latter a cause of action against the former for personal injuries, when. *Hahs v. Railroad*, 262.
2. ———. **Liability of lessor.** *Ib.*
3. ———. **Definition of lease.** *Ib.*
4. ———. **Effect of leasing defective road.** *Ib.*
5. **General Duty of Landlord as to Repairs, Under Common Law.** *Ib.*
6. **Leasehold: Reassignment: Effect Upon Covenants: Good Faith.** The case decides under what circumstances a tenant may reassign his lease and thereby relieve himself from liability

LANDLORD AND TENANT—Continued.

for future breaches of the covenants therein; and also states the reasons for such rule. *McMorris v. Real Estate Co.*, 667.

7. ———: ———: ———: **Transaction Held to be Fictitious.** The so-called assignment of the lease in question was, under the evidence in this case, a sham, and therefore of no effect. *Ib.*

LEASE. See *Landlord and Tenant*.

LICENSE.

Drummer of Foreign Corporation. *Greenbrier, etc., Co. v. Van Frank*, 204.

LIMITATIONS. See *Statute of Limitations*.

LOCAL OPTION.

Local Option Law and Druggists' Law. The Local Option Law does not abrogate the law relating to the sale of liquor by druggists. *State v. McAnally*, 130.

MARRIAGE AND DIVORCE. See *Divorce*.

MARSHALING OF LIENS.

Duty of Creditor. *Lakenan v. Trust Co.*, 48.

MASTER AND SERVANT.

1. **Instructions.** Failing to submit issue of contributory negligence. *Brannock v. Railroad*, 301.
2. **Railroads: Negligence: Injury to Servant: Manner of Injury: Question for Jury, When.** Under the evidence in this case the question whether deceased was killed as the result of his foot being caught in defendant's unguarded rails was for the jury. *Ib.*
3. **Railroad's Failure to Block Guardrails.** It is negligence for a railroad to fail to block its guardrails. *Ib.*
4. **Negligence: Injury to Servant: Defective Machine: Sufficiency of Evidence.** There was sufficient evidence in this case to warrant the submission to the jury of the question of whether or not there were defective cogs in a pulley operated by defendant, whether or not defendant had notice thereof, and whether or not plaintiff was injured thereby. *Panos v. American, etc., Co.*, 570.
5. **Employment: Contract by the Year.** The evidence in this case is held to support a finding that a contract of employment was by the year. *Arnold v. Steel Spring Co.*, 451.

MECHANIC'S LIEN.

Definition. Meaning of lien in bond for construction of school-house. *School District ex rel. v. Beggs*, 177, 187.

MISCONDUCT. See *Practice, Trial*.

MONOPOLIES.

Illegal Contract With Reference to Treatment of Hair. *Pope-Turnbo v. Bedford*, 692.

MUNICIPAL CORPORATIONS.

1. **Employment of Counsel: Delegation of Power.** While a municipality may delegate to an agent a mere ministerial act unless expressly forbidden, yet discretion conferred upon one class of city officers by positive legislative direction may not be transferred or delegated to others. *Edwards v. Kirkwood*, 599.
2. ———: **Unauthorized Delegation of Authority.** Where the mayor and council are by statute authorized to employ counsel they cannot by ordinance delegate the power of such employment to the city collector. *Ib.*
3. ———. The power to contract with an attorney is within the powers of the city, the only informality in the contract in question being that the contract was made by an unauthorized agent. *Ib.*
4. ———: **Equitable Estoppel: Intra Vires and Ultra Vires.** Where a contract within the powers of a municipal corporation is made by a representative having no authority to make the same, the corporation may be estopped to deny the legality of such contract, although estoppel will not lie when a municipal corporation makes a contract wholly beyond its power. *Ib.*
5. **Equitable Estoppel: Irregularly Executed Contract of Employment: Acceptance of Service by City.** Under the facts in this case, the city having received the benefit of the contract of employment will not be heard to say that it is invalid because the city had no right to delegate the power of making such contract to an officer having no such authority. *Ib.*
6. **Power to Contract: Constitutional Provisions.** Under the constitution, a municipal corporation cannot be made liable on contract made without express authority of law. *Ib.*
7. **Employment of Counsel: Matter of Discretion.** The matter of employing counsel to represent a municipality in matters of controversy involves the exercise of discretion. *Ib.*
8. **Officers: Personal Liability.** Municipal officers presumably act for their principals and not for themselves in making a municipal contract, and such officers are not personally liable unless the language of the contract clearly evidences such an intention. *Ib.*
9. ———: **Scope of Authority: Persons Contracting Bound to Ascertain.** Persons contracting with municipal corporations must at their peril ascertain the scope of the authority of the officer attempting to make such contract. *Ib.*
10. **Officers: Personal Liability of Officer: Mistake as to Law.** A public officer who contracts for a municipality will not be held personally liable for making a contract which he has no authority to make, when he acts in good faith and when his unauthorized act is due to an error of law concurred in by the other party to the contract. *Ib.*

NEGLIGENCE. See Contributory Negligence.

1. Injury to Servant. See Master and Servant.
2. Act of God, Defense When. Wertheimer, etc., Co. v. Railroad, 489; Edwards v. Lee, 88
3. Connecting Carriers. Respective liabilities. Crockett v. Railroad, 347.
4. Fires. Caused by railroads. Barnes v. Railroad, 185.
5. Injury by Automobiles. Scholl v. Grayson, 652.
6. Street Railways. Causing death of child. Knittel v. United Railways Co., 677.
7. Unblocked Guardrail. Brannock v. Railroad, 301.
8. Physicians and Surgeons. Unskillful treatment by physician. McClarin v. Grenzfelder, 478.
9. ———. Failure to procure proper treatment. Scholl v. Grayson, 652.
10. Warehouseman. Liability of, for goods damaged or lost. Collier v. Langdon, etc., Co., 700.
11. Street Railways: Excessive Speed: Sufficiency of Evidence. There was sufficient evidence in this case that defendant's car was running at an excessive rate of speed near a public school, just after children were dismissed therefrom. Knittel v. United Railways Co., 677.
12. ———: ———: Killing Child: Motorman's Failure to Keep Vigilant Watch: Sufficiency of Evidence. Under the evidence in this case, there was proof that a motorman operating the car had failed to keep a vigilant watch and that his negligence was the proximate cause of the death of plaintiff's child. *Ib.*
13. Railroads: Injury to Child on Track: Sufficiency of Evidence. In an action for the death of a child killed by the sudden movement of cars across a public crossing, the evidence offered was sufficient to show negligence on the part of defendant. Compton v. Railroad, 414.
14. Railroads: Turntable Doctrine. The doctrine of the "turntable cases" is that turntables are dangerous instrumentalities attractive to children, which they can use to their own injury. The doctrine does not apply to cars standing on switch tracks. The only obligation of the railroad company to children in such cases is not to suddenly move such cars without proper warning. *Ib.*

OFFICERS.

Personal Liability of for Municipal Contract Irregularly Executed. Edwards v. Kirkwood, 599.

PARTIES.

1. **Connecting Carriers.** *Crockett v. Railroad*, 347.
2. **Contract for Benefit of Third Person.** *School District ex rel. v. Beggs*, 177, 187.
3. **Municipal Corporations: Action to Collect Taxes.** An action by a city of the fourth class to collect taxes is not one strictly *in rem*, hence the owner is a necessary party. *State v. Bartlett*, 133.

PARTNERSHIP.

Connecting Carriers. *Crockett v. Railroad*, 347.

PHYSICIANS AND SURGEONS.

1. **Contributory Negligence.** Duty of injured person to select skillful physician. *Scholl v. Grayson*, 652.
2. **Negligent Treatment by: Liability of Physician.** Unsuccessful results of an approved method of surgery do not create a cause of action. *McClarin v. Grenzfelder*, 478.
3. ———: ———. The evidence in this case warranted the submission to a jury of the question of whether or not plaintiff's hernia was improperly treated. *Ib.*
4. ———: ———: **Degree of Care: Specialists.** A physician representing himself as a specialist must possess the skill of a specialist. *Ib.*
5. ———: ———: ———. Following recognized system of treatment. A physician adopting one of several recognized methods of treatment and using the same skillfully is not liable for unsuccessful results even though the method adopted is of recent origin; but if the method is experimental the rule is otherwise. *Ib.*

PLEADING.

1. **Before Justice of the Peace.** See **Justice of the Peace.**
2. **Principal and Agent: Authority of Agent: False Representations of Agent: Variance: Instructions.** In an action for liquor sold it was erroneous to tell the jury that if defendant's alleged agent falsely represented that he was defendant's authorized agent and made such statement for the purpose of securing the goods in question for himself, and that plaintiff sold on the strength of such representation, defendant was liable. *Greenbrier Distillery Co. v. Van Frank*, 204.
3. **Account Stated: Variance.** One suing on an account stated may prove its existence by necessary facts, but he cannot abandon the account stated and recover on the original items. *Barr v. Lake*, 252.
4. ———: **Nature: Pleading.** An investigation of the merits of the several items in an account stated cannot be had under a general denial. *Ib.*

PLEADING—Continued.

5. ———: ———: **Fraud, Accident or Mistake.** In an action on an account stated in the absence of fraud affirmatively appearing defendant must specifically plead fraud, accident or mistake. *Barr v. Lake*, 252.
6. **Contracts: Legal Implication.** An allegation as to the making of a contract implies that it is legally made. *Moots v. Cope*, 76; *Edwards v. Kirkwood*, 599.
7. **Code: Bill in Equity.** The old form of bill in equity is not in use in Missouri, section 592, R. S. Mo. 1899, providing that plaintiff's first pleading is the petition and prescribing what it shall contain. *Vogelsong v. St. Louis, etc., Co.*, 578.
8. **Municipal Corporations.** Judgment for taxes cannot be rendered for a year not sued for. *State v. Bartlett*, 133.
9. ———: **Contract for Legal Services: Presumption of Rightful Exercise of Authority.** Where a pleading in an action against a municipal corporation for legal services alleges a lawful employment, it will be presumed that the conditions required by statute existed so as to warrant such employment. *Edwards v. Kirkwood*, 599.
10. **Carriers of Live Stock: Negligence: Variance.** A petition charging delay in shipment of cattle will not permit proof of injuries received in transit. *Hunter v. Railroad*, 28.
11. **Real Estate Brokers: Amended Reply: Departure.** A reply charging acquiescence in a verbal contract made by an agent is a departure from a petition charging violation of a written contract made by defendant's agent with defendant's authority. *Moots v. Cope*, 76.
12. **Damages: Loss of Time and Earnings.** An averment of "loss of time" in a petition for negligent injuries is the same in legal effect as is an averment of "loss of earnings." *Scholl v. Grayson*, 652.
13. ———: **Permanent Injuries.** An allegation of "permanent injuries" is not equivalent to alleging loss of time or of earnings. *Ib.*
14. ———: **Future Earnings.** "Future loss of earnings" signifies diminution of earning capacity in the future and the latter may be shown under that averment. *Ib.*
- 14a. **Written Contract.** What constitutes. *Hahs v. Railroad*, 262.
15. ———. An instrument signed by both parties may be denied in an unverified pleading. *Ib.*
16. **Verified Denial.** The failure of a plaintiff to deny execution of a release pleaded in an answer amounts to a confession of the signing and delivery thereof. *Ib.*
17. **Recovery for Damages Not Pleaded.** Proof of expenses incurred competent under allegation of expenses paid, when. *Scholl v. Grayson*, 652.

PLEADING—Continued.

18. ———. Items not pleaded not recoverable. *State v. Bartlett*, 133.
19. **Variance Between Pleading and Proof.** Proof that animal went on track through open gate provable under allegation of defective fence, when. *Pruitt v. Railroad*, 2.
20. ———: Indictments and Informations. *State v. Thothon*, 596.
21. ———. Submitting issues not pleaded. *Ib.*
22. **Allowing Recovery on Theory Not Counted On.** A person having a cause of action on different theories can recover only on that one which is pleaded. *Compton v. Railroad*, 414.
23. **Estoppel.** Must be pleaded. *Moots v. Cope*, 76.
24. **Fraud.** Must be pleaded. *Barr v. Lake*, 252.
25. **Contract.** Allegation of contract implies contract legally made. *Edwards v. Kirkwood*, 599.
26. **Accounting.** *Vogelsong v. St. Louis, etc., Co.*, 578.
27. **Bill of Discovery.** *Ib.*
28. **Prayer for General Relief.** *Ib.*
29. **Connecting Carriers.** Respective liabilities. *Crockett v. Railroad*, 347.
30. ———. Contribution. *Ib.*
31. **Fraudulent Conveyances.** *Fernandez v. LaMothe*, 644.
32. **Charging Mental Anguish and Bodily Pain for Disturbance of Peace.** *Voss v. Bolzenius*, 375.
33. **Joining Legal and Equitable Defenses.** The joinder of a legal and equitable defense in a single count of a reply is bad pleading. *Laswell v. Handle Co.*, 497.
34. **Constructive Trusts: Sufficiency of Petition.** Plaintiff's petition charged that he was the owner of a patent machine for making wood fibre plaster and that he leased the right to use the same to an individual who acted as trustee for the St. Louis Wood Fibre Plaster Company, and that the lessee agreed not to use the machine outside of a limited territory; that the individual defendants in the action were officers of the Acme Cement Plaster Company, a company controlled by the St. Louis Wood Fibre Plaster Company; that another wood paper machine was patented, and purchased by the Acme Company; and that other wrongful acts were committed. Plaintiff sought to require an accounting from the Acme Company and the individual defendants, but sought no relief as against the St. Louis Company. The court held that the facts alleged would not establish a constructive trust against the Acme Company or the individual defendants; the mere fact that the same persons were interested in the two companies as stockholders or officers would not of itself be sufficient to charge one com-

PLEADING—Continued.

- pany with the acts of the other. *Vogelsong v. St. Louis, etc., Co.*, 578.
35. **Common Carriers: Failure to Furnish Cars: Damages: Motion to Make Definite.** Motion to make definite allegations as to damages will not lie in this case. *Shoptaugh v. Railroad*, 8.
36. ———: ———: ———: **Sufficiency of Petition.** Sufficiency of pleading in action against carrier for failure to furnish cars as ordered. *Ib.*
37. ———: ———: ———: ———: **Motion to Make Definite and Certain.** Motion to make allegations as to liability more definite will not lie in this case. *Ib.*
38. **Probate Courts.** Formal pleadings are not required in proceedings in the probate court or in the circuit court on appeal therefrom. *Kessler v. Clayes*, 88.
39. **General Denial: Account Stated: General Issue at Common Law and Under Code.** The statutory general denial differs from the plea of *non assumpsit* under the common law in that under the former only such facts may be disproved as are essential to sustain the plaintiff's case. *Barr v. Lake*, 252.
40. ———: ———. In an action on an account stated the defendant may show under a general denial that there was no account at all, or that he had had no dealings with the plaintiff. *Ib.*
41. ———: ———: **Contracts.** Ordinarily in an action on a contract it may be shown under a general denial that there was no contract, but not when the contract is one which is confessed as a matter of law by a failure to plead *non est factum* under oath. *Hahs v. Railroad*, 262.
42. ———: **Special Defenses.** Under a general denial it is competent to prove that plaintiff never had any cause of action. *Barr v. Lake*, 252.
43. ———: ———: ———. Defenses not admissible under a general denial must be pleaded. *Ib.*

PRACTICE, APPELLATE.

1. See Practice, Trial.
 2. See Instructions.
 3. **Improper Submission of Issue, Harmless Error, When.** *Collier v. Langan, etc., Co.*, 700.
 4. **Rules: Abstract of Record: Numerous Interlineations.** Too many interlineations in the printed abstract may constitute a violation of the rule requiring such abstracts to be printed in fair type. *School District ex rel. v. Beggs*, 177, 187.
 5. **Presumptions: Instructions: Issues Presented.** A refused instruction which omitted material issues was presumably refused on that ground. *Kessler v. Clayes*, 88.
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PRACTICE, APPELLATE—Continued.

6. ———: **Judgments.** In the absence of erroneous declarations of law, the judgment will be affirmed on appeal, if it can be sustained on any ground under the pleadings. *Kessler v. Claves*, 88.
7. ———: **Regularity of Proceedings in Trial Court.** It is presumed that all facts necessary to support a judgment have been proved. *Bick v. Dickson*, 69; *Bick v. Umstadt*, 74.
8. ———: **Reason for Granting New Trial: Conclusiveness of Record.** It will be presumed on appeal that the reason given by the trial court for the granting of a new trial is that stated in the entry. *Kelleher v. Railroad*, 553.
9. **Error in Favor of Appellant.** One may not on appeal complain of error in his favor. *Knittel v. United Railways Co.*, 677.
10. **Instructions: Invited Error.** Where appellant submits an issue outside of pleadings he cannot complain of error on that account. *Pruitt v. Railroad*, 2.
11. **Issues Not Presented Below.** Cases must be tried on the same theory on appeal as below. *Gupton v. Carr*, 105.
12. **Jurisdiction: Final Judgment: Counterclaim.** An appeal will lie from a final judgment on a counterclaim, even though plaintiff's petition states no cause of action. *Beyer-Knox Co. v. Ewell*, 188.
13. **No Bill of Exceptions.** Where no bill of exceptions is filed and no error appears in the record proper the judgment will be affirmed. *Corinth Woolen Mills v. Wabash Railroad Co.*, 456.
14. **Overruling Challenge of Juror: Necessity of Calling Attention to Error in Motion for a New Trial.** An exception to the overruling of a challenge of a juror must be preserved in the motion for a new trial. *Pemiscot, etc., Co. v. Davis*, 194.
15. **Special Jury: Refusing to Discharge: Discretion of Court: Failure to Save Exception.** Where no objection or exception is saved to the summoning or selecting of a special jury except in the motion for a new trial, such motion is properly overruled on that ground. *Smith v. Bank*, 461.
16. **Instructions: When Error is Prejudicial.** Where appellant offered substantial evidence, an erroneous instruction against him will be presumed prejudicial. *McKnight, etc., Co. v. Hudson*, 31.
17. **Reversal to Permit Amendment and New trial.** Where the failure of a plaintiff to properly deny the execution of a release is partly excused by an erroneous ruling of the trial court and there is substantial evidence showing a right to make such denial, the case will be remanded to permit an amendment of the reply and a retrial. *Hahs v. Railroad*, 262.
18. **Harmless Error.** Permitting a physician to state the amount of his bill is harmless error if the plaintiff remits more than the amount of such bill. *Scholl v. Grayson*, 652.

PRACTICE, APPELLATE—Continued.

19. ———: **Damages: Personal Injury: Instructions: Loss of Time: Inability to Work.** An error in submitting an issue of damages unsupported by any evidence is harmless where the injury is severe and the verdict is small. *Panos v. American, etc., Co.*, 570.
20. ———: **Replevin: Judgment: Failure to Confirm Plaintiff's Right of Possessions.** Where a judgment in replevin is defective in not awarding plaintiff the right to the possession of the property the case may be affirmed if the defect is harmless as it was in this case. *Beyer-Knox Co. v. Ewell*, 188.
21. **Refusal of Appellate Court to Weigh Conflicting Evidence.** The finding of the trial court on conflicting evidence will not be disturbed on appeal. *Brauckman v. Dry Goods Co.*, 559; *Brandon v. Railroad*, 381.
22. ———. Appellate courts will not ordinarily weigh conflicting evidence in a law action. *Stout v. Hardware Co.*, 27; *Hunter v. Railroad*, 28; *Johnson v. Stephens*, 75; *Beyer-Knox Co. v. Ewell*, 188.
23. ———: **Awarding New Trial: Discretion of Trial Court: Excessive Damages.** An appellate court will interfere with the discretion of the trial court in granting a new trial because of excessiveness of verdict, only in extreme cases. *Kelleher v. Railroad*, 553.
24. **Disregard of Testimony by Trial Judge: Reason Stated of Record.** Where the trial court declines to give credence to the testimony of witnesses in a divorce case and so states of record, the appellate court will ordinarily follow his decision. *Hamberg v. Hamberg*, 591.
25. **Awarding New Trial: Excessive Damages: Discretion of Trial Court.** A verdict for \$300.00 actual damages and \$300.00 punitive damages was permitted to stand by the trial court on condition that the punitive damages be remitted. It is to be presumed that the trial court found that punitive damages should not have been allowed and that the allowance of \$300.00 actual damages was not so excessive as to require a new trial. *Kelleher v. Railroad*, 553.
26. **Supersedeas Bond.** When approved by clerk and when by court. *State ex rel. v. Graves*, 324.

PRACTICE, TRIAL.

1. See **Instructions.**
2. See **Practice, Appellate.**
3. **Jury.** Juror incompetent on account of relationship. *Pemis-cot, etc., Co. v. Davis*, 194.
4. **Costs.** On counterclaim. *Beyer-Knox Co. v. Ewell*, 188.
5. **Equitable Defense: Asking Affirmative Relief: Hearing by Court.** Where, in a reply two defenses of a legal and one of an equitable nature are united in a single count and affirmative relief in connection with the equitable defense is presented,

PRACTICE, TRIAL—Continued.

- that matter should be heard and determined by the court. *Laswell v. Handle Co.*, 497.
6. **Evidence: Conclusiveness.** Opinion evidence is not binding on the party offering it, especially if there is countervailing evidence. *Brannock v. Railroad*, 301.
 7. **Railroads: Negligence: Injury to Child on Track: Conflicting Evidence.** Where the evidence conflicted as to whether a child fell from the cars or was struck by them, the issue is for the jury. *Compton v. Railroad*, 414.
 8. **Direction of Verdict. Sufficiency of evidence to authorize submission of case to jury.** See **Sufficiency of Evidence**.
 9. ———: **Demurrer to Evidence.** A demurrer cannot be sustained where there is substantial evidence sustaining plaintiff's case. *Voss v. Bolzenius*, 375.
 10. ———, **Uncontradicted evidence requires direction of verdict.** *Evans v. Modern Woodmen*, 155. See also, *Hamberg v. Hamberg*, 591.
 11. **Improper Argument of Counsel: Error Cured by Retraction, When.** Where an attorney makes a statement not supported by the evidence, and the court states there is no such evidence and counsel retracts the statement, such argument though improper is not ground for reversal. *Collier v. Langan, etc., Co.*, 700.
 12. **Saving Exceptions.** Exceptions cannot be saved by record entries. *School District ex rel. v. Beggs*, 177, 187.
 13. ———, **Must be saved in motion for new trial and bill of exceptions.** *Corinth, etc., Mills v. Railroad*, 456; *Pemiscot, etc., Co. v. Davis*, 194; *Smith v. Bank*, 461.
 14. **Municipal Corporations: Action to Collect Taxes: Necessity of Proving Ownership: Evidence: Taxbills.** In a suit to enforce a lien for taxes, prima facie evidence of ownership, independent of the taxbill itself, must be offered. *State v. Bartlett*, 133.
 15. **Damages: Pleading and Proof: Evidence of Obligation Incurred Under Allegation of Obligation Paid: Failure to Object.** Where the petition charged that expenses had been paid, proof of the incurring of an indebtedness is incompetent on proper objection, but not otherwise. *Scholl v. Grayson*, 652.
 16. **Damages: Pleading: Absence of Averment Non-prejudicial.** Where evidence is received without objection showing that plaintiff was so injured that there was a certainty that his earnings in the future would be diminished, the submission of such issue was not error. *Ib.*
 17. **Negligence: Personal Injuries: Pleading: Hospital Bills: Evidence Received Without Objection.** It is better pleading to allege among the claims for damages the amount of a hospital bill; but if evidence thereof is admitted without its being pleaded, it is not error to submit that item to the jury. *Ib.*

PRACTICE, TRIAL—Continued.

18. **Real Estate Brokers: Pleading: Amended Reply: Departure.** Where the evidence would not support a case on the theory presented by an amended reply, leave to file such reply after the close of the evidence is properly denied. *Moots v. Cope*, 76.
19. ———: ———: ———: ———. It is proper after all the evidence is in to refuse leave to file a reply changing a cause of action set up in the petition. *Ib.*
20. **Change of Theory: Instructions: Refusal of Instructions Covering Opponent's Abandoned Theory.** Where plaintiff abandons the theory that a purchase made by an agent was ratified by the principal, and relies solely on the claim that the agent had authority to make the purchase, the issue of ratification is out of the case even though it was held on a former appeal that evidence on such issue was competent. *Greenbrier Distillery Co. v. Van Frank*, 204.
21. **Pleading: Election.** Where a reply to a counterclaim in an answer which counts on the breach of a contract pleads fraud in the procurement of the contract, as an equitable defense, and the non-performance a condition precedent, as a legal defense, both defenses resting upon the same facts, only the defense which is best supported by the evidence should be insisted upon. *Laswell v. Handle Co.*, 497.
22. ———. A question of indefiniteness of allegations may be raised by objection on the trial. *Shoptaugh v. Railroad*, 8.
23. ———: **Waiver.** Pleading over after adverse ruling on motion to make definite waives objection. *Ib.*
24. **Supersedeas Bond: Fixing Amount After Trial Term.** Where time is given to file an appeal bond after adjournment of court and a new term begins within the time allowed, the court may fix the amount of such bond at such subsequent term. *State ex rel. v. Graves*, 324.
25. ———: **Approval by Clerk.** Where time is given to file an appeal bond after the adjournment of court, the clerk may approve such bond in vacation only. *Ib.*
26. ———: **Courts: Vacation: Sunday.** Where a term ends on Saturday and a new term begins on the following Monday there is no vacation. The clerk cannot approve a bond on Sunday. *Ib.*
27. ———: **Approval by Court at Subsequent Term.** Where the ten days allowed for filing an appeal bond after the adjournment of court runs into the next term, a bond should be approved by the court and not by the clerk. *Ib.*

PRESCRIPTION.

Roads and Highways. Sufficiency of evidence to prove public right. *Letweke v. Link*, 19.

PRESUMPTIONS.

1. **See Evidence.**

PRESUMPTIONS—Continued.

2. See Practice, Appellate.
3. Connecting Carriers. Respective liabilities. *Crockett v. Railroad*, 347.
4. Conflict of Laws. Law of another state. *Atwater v. Brokerage Co.*, 436.
5. Inferences and Their Weight. *Laswell v. Handle Co.*, 497.

PRINCIPAL AND AGENT.

1. Evidence Showing Relation. *Greenbrier, etc., Co. v. Van Frank*, 204.
2. Authority of Agent. *Ib.*
3. Instructions. Sufficiency of circumstantial evidence. *Ib.*
4. Municipal Officers. Liability of municipal employe on defectively executed contract. *Edwards v. Kirkwood*, 599.
5. Competency of Wife as Witness. *Collier v. Langdon, etc., Co.*, 700.
6. Broker. Rights under gambling contract. *Atwater v. Brokerage Co.*, 436.
7. Connecting Carriers. Power to bind by contract. *Crockett v. Railroad*, 347.
8. Statute of Frauds: Contract to Sell Real Estate: Variance from Terms. Written authority to an agent to sell real estate will not permit the agent to make a contract different from that authorized. *Moots v. Cope*, 76.
9. ———: ———: ———: ———: Evidence: Verbal Acquiescence. Written authority to an agent to make a contract for the sale of real estate cannot be modified by a subsequent parol agreement. *Ib.*
10. Proof of Agency: Instructions. Ordinarily the authority of an agent may be implied; it need not be expressly granted. An instruction misstating this rule was held to be erroneous. *Greenbrier Distillery Co. v. Van Frank*, 204.
11. Powers of Factors: Limitation of Authority. As between the parties thereto, a sale for cash on delivery will not permit the vendee to pass title before payment unless such restriction has been customarily disregarded. A third person acquiring the property from the consignee in ignorance of such restriction may acquire title thereto. *Smith v. Bank*, 461.
12. ———: Limitation of Authority: Transactions With Third Persons: Ratification. A consignor shipped goods to a factor to sell or re consign, the invoice containing the words "terms cash on delivery of goods." A corporation controlled by the consignee re-consigned the goods, without paying the purchase price, and sold the draft drawn against them to a bank, which took possession of the goods and retained the proceeds of a

PRINCIPAL AND AGENT—Continued.

sale thereof. The consignor sued the bank for conversion, after he had accepted the draft of the corporation sent in payment of the goods but which draft was not paid because of the insolvency of the corporation. There was nothing to show the bank knew of the financial condition of the corporation. The case decides: a. What facts the bank must show to support its right to the proceeds of such sale. b. What facts would establish notice to the consignor of the insolvency of the corporation to which the consignee delivered the goods. c. What facts were not admissible to establish notice to the bank of the insolvency of the corporation to which the consignee delivered the goods. *Smith v. Bank*, 461.

PRINCIPAL AND SURETY.

1. **Bond for Construction of Schoolhouse.** Liability of surety. *School District ex rel. v. Beggs*, 177, 187.
2. **Mechanics' Liens.** Meaning of term in bond to secure performance of a contract for a school building. *Ib.*
3. **Common Law Bond.** *Ib.*
4. **Marshaling Liens: Duty of Creditor: Applying Proceeds of Mortgaged Property to Secure Debt.** Proper method of distribution of proceeds of property mortgaged to secure a note, which note was also signed by a surety. *Lakenan v. Trust Co.*, 48.
5. ———: **Preserving Liens.** A creditor must act in good faith to preserve the liens of others as well as his own. *Ib.*
6. ———: ———: **May Not Release Collateral Security.** In the absence of statute a creditor need not enforce a lien on the principal's property. But the creditor's failure to properly handle property subject to lien may release the surety. *Ib.*
7. ———: ———: **Constructive Notice.** A creditor holding a note secured by mortgage and endorsed by a surety, having knowledge of facts which would lead to an inquiry, is held to have notice of what such inquiry would disclose, and if with such notice he sacrifices the surety's rights the surety is released. *Ib.*
8. ———: ———. The facts in this case show that the creditor had notice and violated the rights of the surety. *Ib.*
9. ———: **Sale of Property Mortgaged to Secure Debt: Knowledge of Surety.** The knowledge of the surety of the creditor's wrongful acts in reference to the security does not deprive the surety of his rights. *Ib.*

PROBATE COURTS. See *Executors and Administrators.*

PROXIMATE CAUSE.

1. **Passenger Injured by Jerk of Freight Train.** *Ray v. Railroad*, 332.
2. **Injury to Passenger on Depot Platform.** *McClanahan v. Railroad*, 386.

PROXIMATE CAUSE—Continued.

3. **Act of God in Flood Cases.** *Wertheimer, etc., Co. v. Railroad*, 489.
4. **Switchman Killed Between Moving Cars by Unblocked Frogs.** *Brannock v. Railroad*, 301.

PUBLIC POLICY.

1. **Enforcing Laws of Other State.** *Atwater v. Brokerage Co.*, 436.
2. **Construing Divorce Statutes.** *Hamberg v. Hamberg*, 591.

PUBLIC SERVICE CORPORATIONS.

Unlawful Combinations. *Home, etc., Co. v. Telephone Co.*, 216.

QUESTION FOR JURY. See **Sufficiency of Evidence.**

RAILROADS.

1. **Injury to Child on Track.** *Compton v. Railroad*, 414; *Knittel v. United Rys. Co.*, 677.
2. **Negligence.** Death of switchman caused by unblocked guard-rail while going between moving cars. *Brannock v. Railroad*, 301.
3. ———. **Defective coupling device as excuse for going between cars.** *Ib.*
4. ———. **Maintaining unblocked guardrail is negligence.** *Ib.*
5. **Assumption of Risk.** Working with knowledge of unblocked rails. *Ib.*
6. **Contributory Negligence.** Degree of care required with knowledge of greater danger. *Ib.*
7. **Negligence: Fires.** The facts in this case are identical with the facts in *Vanderburgh v. Railroad*, 146 Mo. App. 609, which is followed. *Barnes v. Railroad*, 135.
8. **Fences: Killing Animals.** Whether or not it was practical for a railroad company to fence the ground in question was a question for the jury. *Brandon v. Railroad*, 381.
10. **Fences: Killing Animals: Sufficiency of Evidence.** Sufficiency of evidence in action against railroad for death of stock due to insufficient fence. *Porter v. Railroad*, 1; *Pruitt v. Railroad*, 2.
11. ———; **Double Damage Statute.** Railroad's duty to maintain fence requires keeping gates closed. *Pruitt v. Railroad*, 2.
12. ———; ———; **Variance: Sufficiency of Evidence: Pleading: Practice.** Proof that animal went through open gate when petition charges defective fence is a mere variance. In this case the evidence does not show conclusively that the animal went through an open gate. *Ib.*

RAILROADS—Continued.

13. **Leases: Liability of Lessor: Statute.** The general rule that an incorporated railroad company cannot escape liability by leasing its road to another does not obtain where such lease is made with legislative consent. *Hahs v. Railroad*, 262.
14. ———: ———. The liability of the lessor company for the acts of the lessee company exists only in case a domestic railroad company leases to a foreign railroad company. *Ib.*
15. ———: ———: **Definition of Terms.** A railroad lease within the meaning of the statute must result in the lessor losing possession and control of the property just as in an ordinary landlord and tenant case. *Ib.*
16. ———: ———: ———: **Duty to Repair.** Under the common law, in the absence of an agreement therefor, the landlord had no duty or authority to make repairs on the leased property. *Ib.*
17. ———: ———: ———: **Defective Construction.** Where a railroad company leases a road defective at the time of the lease both lessor and lessee are liable for injuries caused thereby, the lessor's liability being based on its conduct in leasing a nuisance. *Ib.*
18. ———: ———: ———. Where the property when leased was in good repair the acts of the lessee, a domestic railroad company, in letting it get out of repair do not create a liability as against the lessor. *Ib.*

RELEASE.

1. **Sufficiency of.** Written on payroll. *Hahs v. Railroad*, 262.
2. **Parol Evidence.** Incompetent to contradict. *Ib.*
3. **Pleading.** Facts provable under a general denial. *Ib.*

REPLEVIN.

Judgment Irregular: Effect of. Judgment failing to award plaintiff right of possession, not fatally defective, when. *Beyer-Knox Co., v. Ewell*, 188.

RES IPSA LOQUITUR.

Jerks of Freight Train. Passenger injured by jerk of freight train must prove negligence. *Ray v. Railroad*, 332.

RESCISSION.

Fraud Authorizes. *Laswell v. Handle Co.*, 497.

RESTRAINT OF TRADE.

Contract Invalid. *Pope-Turnbo v. Bedford*, 692.

ROADS AND HIGHWAYS.

1. **Private Road: Prescription: Sufficiency of Evidence.** Sufficiency of evidence to prove right to private way across another's land by prescription. *Leiweke v. Link*, 19.

ROADS AND HIGHWAYS—Continued.

2. ———: **Statute of Limitations.** The public can acquire an easement by ten years adverse user unless prevented by statute. *Leiwke v. Link*, 19.
3. ———: ———: **Prospective Operation.** The statute preventing the operation of the ordinary Statute of Limitations and permitting the use of a private way did not operate retrospectively. *Ib.*

SALES. See **Contracts.**

SCIRE FACIAS.

Will not lie, When. *Bick v. Dickson*, 69; *Bick v. Umstadt*, 74.

SET-OFF AND COUNTERCLAIM.

1. **Appeal from Judgment on Counterclaim.** *Beyer-Knox Co. v. Ewell*, 188.
2. **Costs.** Discretion of court. *Ib.*

STATUTE OF FRAUDS.

Written Authority of Agent to Sell Real Estate. *Moots v. Cope*, 76

STATUTE OF LIMITATIONS.

1. **Roads and Highways.** Right of public to use road. *Leiwke v. Link*, 19.
2. **Burden of Proof.** A defendant who pleads the Statute of Limitations has the burden to prove that plaintiff's claim is barred. *Pemiscot, etc., Co. v. Davis*, 194.
3. **Trespass to Real Estate: Burden of Proof: Cutting Timber.** Where proof is made of the wrongful cutting of timber by defendant, the burden is on him to show that the cutting was more than five years before the filing of suit. *Ib.*

STOCKHOLDERS.

Liability When Same in Two Corporations. *Vogelsong v. St. L., etc., Co.*, 578.

STOPPAGE IN TRANSIT. See **Carriers of Goods.**

STATUTES CITED AND CONSTRUED.**Constitution.**

Sec. 22, Art. 2, see page 131.
Sec. 48, Art. 4, see page 599.

Laws 1872.

p. 129, sec. 219, 220, see page 145.

Wagner's Statutes 1872.

Sec. 219, 220, 221, see page 148.

Revised Statutes 1879.

230, see page 124.

Laws 1885.

p. 214, see page 328.

Revised Statutes 1889.

2039, see page 587.

Laws 1903.

p. 81, see page 600.

p. 117, see page 107.

p. 254, see page 153.

Laws 1905.

pp. 53, 54, see page 351.

Laws 1907.

pp. 124, 150, see page 117.

Revised Statutes 1899.

Section 200, see page 90.	2370, see page 424.
223, 224, see page 123.	2393, see page 423.
285, see pages 90, 102.	2608-2609, see page 130.
457, see page 98.	2870, see page 374.
592, see pages 15, 578.	2921, see page 591.
593, see pages 15, 644.	3418, see page 76.
643, see page 275.	3785, see page 194.
645, see page 100.	4060, see page 565.
659, see page 277.	4074-4078, see page 567.
660, see page 563.	4078, see page 261.
746, see page 262.	4160, see page 330.
776, see page 578.	4273, see page 194.
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653.	5894-6003, see page 610.
1060, see page 263.	5907, see page 599.
1123-1125, see page 301.	5942, see page 134.
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1615, see page 330.	9303, see page 135.
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1931, see page 644.	9319-1, 9319-2, see page
2337-2342, see page 436.	153.
2364, see page 430.	9472, see page 19.

STATUTES, CONSTRUCTION OF.

Unlawful Combination. The statutes forbidding unlawful combinations are in aid of the common law and should be liberally construed. *Home Telephone Co. v. Granby, etc., Co.*, 216.

STREET RAILWAYS.

Negligence. Death of child caused by excessive speed of car. *Knittel v. United Railways Co.*, 677.

SUFFICIENCY OF EVIDENCE.

1. **Desertion in Divorce Case.** *Hamberg v. Hamberg*, 591.
2. **Inferences and Their Weight.** *Laswell v. Handle Co.*, 497.
3. **Roads and Highways.** Establishing right to use of road by prescription. *Leiweke v. Link*, 19.
4. **Directed Verdict.** Uncontradicted evidence requires direction of verdict. *Evans v. Modern Woodmen*, 155.
5. **Intemperance.** Proof, in action of benefit certificate. *Ib.*
6. **Contract.** Evidence insufficient to establish alleged contract with carrier. *Corinth, etc., Mills v. Railroad*, 456.
7. **Carriers of Goods.** Loss of goods by drayman. *Collier v. Langan, etc., Co.*, 700.
8. ———. Loss of freight caused by flood. *Wertheimer, etc., Co. v. Railroad*, 489.
9. **Carriers of Live Stock.** Delivery of cattle other than those shipped. *Edwards v. Lee*, 38.
10. **Carriers of Passengers.** Passenger injured by jerk of freight train. *Ray v. Railroad*, 332.
11. ———. Passenger injured on depot platform. *McClanahan v. Railroad*, 386.
12. **Animals Killed by Railroad.** *Porter v. Railroad*, 1; *Pruitt v. Railroad*, 2.
13. **Death of Child From Cars at Crossing.** *Compton v. Railroad*, 414.
14. **Death of Child Caused by Excessive Speed of Car.** *Knittel v. United Railways Co.*, 677.
15. **Injury to Switchman by Unguarded Rails.** *Brannock v. Railroad*, 301.
16. **Injury to Servant From Defective Machine.** *Panos v. American, etc., Co.*, 570.
17. **Circumstantial Evidence to Prove Agency.** *Greenbrier Distillery Co. v. Van Frank*, 204.

SUIT TO QUIET TITLE.

Jurisdiction of Appellate Court. *Jeude v. Sims*, 65.

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SURETYSHIP. See Principal and Surety.

TAXATION.

1. Form of Judgment In Action for Taxes. *Jamison v. Harvey*, 145.
2. Suit by City to Collect. *State v. Bartlett*, 133.

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1. Illegal Contracts. *Home, etc., Co. v. Telephone Co.*, 216.
2. Not Common Carriers, but Owing Similar Duties. *Ib.*
3. Forbidden to Combine, by Contract. *Ib.*
4. Duty to Furnish Impartial Service. *Ib.*
5. Duty to Transport Messages. *Ib.*
6. One Company's Right to Use Another's Instrumentalities. *Ib.*
7. Effect of Grant of Exclusive Privilege to Another Company. *Ib.*
8. Bound to Serve Another Company. *Ib.*
9. Interest of Public in the Service. *Ib.*
10. Right of Customer to Direct Course of Message. *Ib.*
11. Effect of Statute Compelling Exchange of Service. *Ib.*
12. Private Owner Subject to Same Control as Corporation. *Ib.*
13. Unlawful Combinations. *Ib.*
14. Telephone Message is a "Convenience or Commodity." *Ib.*
15. Enforcing Illegal Contract. Equity will not enforce a contract granting exclusive privilege to another telephone company. *Ib.*

By Reynolds, P. J., dissenting.

16. Contract Legal.
17. Duty of Company. Company bound to give another company only such service as it gives an ordinary customer. *Ib.*
18. Constitutional Rights of Contractors. Not to enforce this contract is a violation of company's constitutional rights.
19. Power of Telephone Companies to Contract. *Ib.*
20. Purpose of Anti-trust statute. *Ib.*

TENDER.

When Unnecessary. A tender is unnecessary where the person to whom it should be made has shown that he will refuse it if made. *Laswell v. Handle Co.*, 497.

TIMBER.

Damages for Cutting. *Pemiscot, etc., Co. v. Davis*, 194.

TRESPASS.

Cutting Timber. *Pemiscot, etc., Co. v. Davis*, 194.

TRUSTS AND TRUSTEES.

Pleading. Sufficiency of petition alleging constructive trust. *Vogel-song v. St. Louis, etc., Co.*, 578.

"TURNTABLE" DOCTRINE.

Attractive to Children. Doctrine not applicable to standing freight cars. *Compton v. Railroad*, 414.

ULTRA VIRES.

Contracts of Municipal Corporations. *Edwards v. Kirkwood*, 599.

UNLAWFUL COMBINATIONS.

Contracts Between Telephone Companies. *Home, etc., Co. v. Tele-phone Co.*, 216.

VARIANCE. See **Pleading**.

VENDOR'S LIEN.

1. **Does Not Exist, When.** A vendor's lien does not exist when the consideration for the purchase of land is a covenant and not money. *Marchand v. Railroad*, 619.
2. **Nature of: Not an Estate.** A vendor's lien is not an estate. If there is no obligation to pay a price for land there can be no lien. *Ib.*
3. **Collateral Covenants: Lien Held Not to Attach.** Where a rail-road company, in consideration of a conveyance of land, agreed to perform certain covenants other than the payment of money, property or service, the grantor on the breach of such covenants cannot enforce a vendor's lien. *Ib.*

VERIFICATION.

Verified Denial of Contracts Necessary, When. *Hahn v. Railroad*, 262.

WAIVER.

1. **Pleading Over.** Waives adverse ruling on motion. *Shoptaugh v. Railroad*, 8.
2. **Of Trial by Jury.** By silence. *State v. McAnally*, 130.

WAREHOUSEMAN.

1. **Liability of, For Goods Lost.** *Collier v. Langan, etc., Co.*, 700.

Carrier May Become. *Ib.*

WEIGHT OF EVIDENCE.

Ordinarily Not Considered by Appellate Court. Brauckman v. Dry Goods Co., 559; Stout v. Hardware Co., 27; Hunter v. Railroad, 28; Johnson v. Stephens, 75; Beyer-Knox Co. v. Ewell, 188; Brandon v. Railroad, 381; Kelleher v. Railroad, 553; Hamberg v. Hamberg, 591.

WITNESSES.

1. **Experts.** On unusual character of traffic. Shoptaugh v. Railroad, 8.
2. **On Ability to Stop Automobile.** Scholl v. Grayson, 652.
3. **On Unusual Jerk of Freight Train.** Ray v. Railroad, 332.
4. ———. Value of evidence of non-expert. It
5. **Failure to Produce.** Presumption. McClanahan v. Railroad, 386.
6. **Husband and Wife: Agency.** Where a wife as agent of her husband has charge of making a contract for moving household goods she is a competent witness as to all of the transactions and incidents connected therewith to which such agency related. Collier v. Langan, etc., Co., 700.

Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—Diminution of Records. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that

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"evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—Evidence—Bill of Exceptions to be Allowed, When. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—Exceptions—Questions to be Embodied in Bill. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—Duty of Circuit Court Clerks in Making Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the ——— day of ———, 188—, executed on the ——— day of ———, 188—;*" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the

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court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—Bill of Exceptions in Equity Cases. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—Abstract and Briefs to be Filed and Served. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—Citing Authorities in Briefs. In compliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may

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adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

RULE 17.—Appellant's Brief to Allege Errors Complained of. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—Agreed Statement of the Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—Motion for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—Motion for Affirmance. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the

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transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

Rule 22.—Extending Time for Filing Statements, Abstracts, Etc. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

Rule 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

Rule 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

Rule 25.—When Appeal is Returnable—Certificate of Judgment—Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

Attest:

L. F. McCOY, Clerk.

Rules of Practice in the St. Louis Court of Appeals.

REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

Rule 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court Room.

Rule 2.—Words Appellant and Respondent, What They Include. Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—Motions. All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

Rule 4.—Hearing of Causes. Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

Rule 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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Rule 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

Rule 10.—Duty of the Clerk in Making Up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the _____ day of _____ 190—, executed on the _____ day of _____, 190—," and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served. In those cases where the appellant shall, under the provisions of section 813, Revised Statutes of 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstracts above referred to and of any

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objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

Rule 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

Rule 14.—Abstracts—When Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes 1899, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

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the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

Rule 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—Citing Authorities in Brief. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

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Authorities incorrectly cited as to book, page or title of case, will be disregarded.

Rule 20.—Extension of Time. Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—Agreed Statement of Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. See *Barnett et al. v. Colonial Hotel B. Co.*, 119 S. W. 471; 137 Mo. App. 636.

Rule 24 is hereby amended to read as follows:

Rule 24.—Oral Arguments. When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, and if he has not consumed all of his time in opening. The whole time consumed by either party in statement and argument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a Justice of the Peace, the time for argument shall not exceed thirty (30) minutes on each side.

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Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court *in extenso* the written or printed argument on file, nor from reports or text books.

The above rule to be in force and effect on and after June 6, 1910.

Rule 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—Allowance to Garnishees. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

Rule 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

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ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—Withdrawing Records. No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

Rule 32.—Repeal of Former Rules. All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

Rule. 33.—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.

RULES OF PRACTICE

IN THE

SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the court room.

RULE 2.—Words Appellant and Respondent, what they include. Whenever the word appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

RULE 3.—Motions. All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

RULE 4.—Hearing of Causes. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

RULE 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

RULE 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove,

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then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

RULE 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

RULE 10.—Duty of the Clerk in Making up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served. In those cases where the appellant shall, under the provisions of section 813, Revised Statutes of 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time.

RULE 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule, and dispense with the necessity of any further transcript.

RULE 14.—Abstracts, when Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty

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days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

RULE 15.—Abstracts, what they shall contain. Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned. Provided: In all cases wherein there are statements or other evidence in the printed abstract of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal and bill of exceptions, and any statement purporting to show that the action of the court on the same was taken in proper time, such abstract shall be deemed sufficient as to such matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be sufficient to state that the abstract does not show such steps were taken in proper time, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time, as the case may be, and thereupon, the Court shall determine the matter and the costs thereof taxed as the Court shall deem just. (Amendment to take effect August 1, 1910.)

RULE 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes 1899, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

RULE 17.—Costs, when Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which

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the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

RULE 18.—Briefs, what to Contain and when Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

RULE 20.—Extension of Time. In no case will extension of time for filing statements, abstracts, or briefs be granted except upon affidavit showing satisfactory cause.

RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

RULE 22.—Agreed Statement or Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the

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cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

RULE 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

RULE 24.—Oral Arguments. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant in error replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

RULE 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

RULE 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the ap-

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pellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless, by the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 28.—Allowance to Garnishees.—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

RULE 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellant has been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

RULE 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

RULE 31.—Withdrawing Records. No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

Adopted this 19th day of August, 1909.

L. J. H.
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